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A TREATISE
ON THE
LAW OF EVIDENCE

AS ADMINISTERED IN ENGLAND AND IRELAND;

WITH ILLUSTRATIONS FROM SCOTCH, INDIAN, AMERICAN,
AND OTHER LEGAL SYSTEMS.

BY HIS HONOUR
THE LATE JUDGE PITT TAYLOR.

Ninth Edition.
(IN PART RE-WRITTEN)
By G. PITT-LEWIS, Q. C.

With Notes as to American Law
By CHARLES F. CHAMBERLAYNE.

IN THREE VOLUMES.

VOL. I.

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PREFACE.

THE American editor is completely excused from the necessity of saying anything concerning the merits of Judge Taylor's original work. A treatise which in England and America has so long and so admirably stood the tests of time and daily use among an exacting profession, critical as to correctness of statement and fullness of research, speaks for itself with sufficient distinctness.

The ninth English edition embodies many extensive and painstaking improvements by G. Pitt Lewis, Esq., Q. C. Among others, mention may be made of the facts that the original work, while benefited by many additional cases, has been condensed, without sacrifice of essential value; and that the range of citation for English and Irish cases and for English legislation has been carried down to a late day. The condensation referred to has added clearness to the text. Many illustrations of principle, which, though valuable in themselves, in earlier editions somewhat impeded the flow of thought, have been judiciously reduced to a proper position as foot-notes, in condensed form and, so far as possible, in alphabetical order. The English editor, thinking, to use his own language, "that the true work of the editor of a law book is to strive his best to render the work which he is editing one that the author would have produced if writing at the

present day," has industriously and successfully labored to that end.

The American editor, while not, it is hoped, neglecting the valuable consideration suggested by his learned coadjutor, has proposed, as his primary object, a somewhat different result: — namely, to give to the profession, so far as conveniently possible within the limitations imposed by the form of notes, such a statement of the modern law of evidence as might be practically useful to the active practitioner, and yet possess value to those who were desirous of acquainting themselves with the fundamental principles of the subject.

It has seemed necessary, in pursuing this object, that many inviting by-paths of antiquarian research should consciously be neglected, and the desire to follow the current of authority up among the headsprings of our jurisprudence should be repressed. The historical development of the present rules of evidence has been noted only so far as seemed fairly needed for a clear conception of the rules themselves. The feeling has been strong that the changed conditions of modern life have not failed to affect also the development of this branch of the law, and that it therefore yearly grows more essential that, as the intricacy and magnitude of matters submitted to judicial investigation continues to increase, the rules of evidence under which they must be determined should be simplified, both in number and through being formulated with precision. In many ways, statutory and judicial, it is fairly to be said that the law of evidence is tending in this direction. The present work is intended as a contribution to the same end.

The range of citation has necessarily embraced the entire United States and the Province of Canada. So far as

possible, leading cases have been cited in each jurisdiction. But to many a practitioner without ready access to a large law library such bountiful citations merely furnish a "feast of Tantalus." To remedy this difficulty, so far as possible, the point of the case cited has been given in the exact language of the court. This not only furnishes a quotable statement, but possesses the additional advantage that the reader is not forced to rely wholly upon the ability of an editor to catch and paraphrase the precise shade of meaning intended by the court.

The plan of putting the entire collection of American law relating to a particular topic at the end of the English chapters on the same subject has been found acceptable in practical use, and is continued in the present international work. To afford still further opportunity for ready reference to American and Canadian law, a separate index to subjects treated in the American notes and a separate tabulation of cases therein cited have been prepared.

While it has not proved possible to embrace within the present compass certain topics covered by well accepted separate treatises, or by the statutes of the several jurisdictions, it is hoped that the present work will prove of material assistance to our busy profession in the preparation and trial of causes, and also be of value to those who are interested in a consideration of the underlying principles which affect the larger aspects of the subject.

CHARLES F. CHAMBERLAYNE.

Boston, January 19, 1897.

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¹ By Common Law, "writing" was, in general, equivalent to a deed. The principal matters required by the Common Law to be "in writing" (that is by deed) are: — (a) Grants or Demises of Incorporeal Rights: (b) Gifts of Personalty unaccompanied by delivery, whether *inter vivos* or *mortis causâ*: (c) Appointments of Agents to execute Deeds: (d) Contracts with Corporations: and (e) Powers of Attorney for the Execution of Deeds.

² The principal matters required by Statute to be evidenced by writing are as follows: — (a) Sales of Ships or Shares in Ships: (b) Certain dealings with Real Property (including Leases for more than Three Years): (c) Or matters falling within the Statute of Frauds, such as Assignments or Surrenders of Realty, Special Promises by Executors or Administrators, Guarantees, Agreements in consideration of Marriage, Contracts for Interests in Lands, Agreements not to be performed within a Year, and Sales of Goods for £10, or upwards: (d) Wills and Codicils and Revocations or Revivals thereof: (e) Acknowledgments (other than by part payment) of Debts or Incorporeal Rights which have become Statute-barred: (f) Acceptances: (g) Contracts under the Truck Act: (h) Or under the Merchant Shipping Act: (i) Documents governed by various other Acts: Or (j) Documents requiring Inrolment or Registration, such as Warrants of Attorney or Cognovits, Bills of Sale, Grants of Annuities, &c.

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Abbreviations

BY WHICH VARIOUS IRISH, SCOTCH, AND AMERICAN AUTHORITIES
ARE CITED IN THIS TREATISE.¹

NOTE.—*Most of the American Reports are to be found in the respective Libraries of the Inner and Middle Temples. But some few of them are only to be obtained at the British Museum. The letters A., B., C., D., appended to the American Reports, denote the relative estimation in which those Reports are held by the profession in general, out of the particular State where the decisions were pronounced: A. marking the highest degree of excellence. A very eminent American jurist kindly furnished the Author with this guide.*

ABBREVIATIONS.	NAME OF WORK, ETC.
Addis.	Addison's Reports, Pennsylvania, 1791—1799. 1 vol. (C.)
Aik.	Aiken's Reports, Vermont, 1826—1827. 2 vols. (B.)
A. K. Marsh.	A. K. Marshall's Rep., Kentucky, 1817—1821. 3 vols. (D.)
Alc. & Nap.	Alcock & Napier's Reports, King's Bench, Ireland. 1 vol.
Alison, Cr. L.	Alison's Principles of the Criminal Law of Scotland.
Alison, Pract. of } Cr. L. }	Alison's Practice of the Criminal Law of Scotland.
Am. Dec.	American Decisions (Select Cases from various American State Courts), San Francisco, 1700—1844. 40 vols.
Am. Ed.	American edition.
Am. Jur.	American Jurist. Boston.
Am. Rep.	American Reports (Selected from the Decisions of the Courts of last resort in the several States of America), Albany, 1869—1887. 60 vols.
Am. St. Rep.	American State Reports (a continuation of American Reports), 1887—1895. 42 vols. (Series still current.)
Anthon	Anthon's Nisi Pr. Rep., New York, 1808—1818. 1 vol. (D.)
Applet.	Appleton's Reports, Maine, from 1841. 1 vol. (C.)
Arm. M. & O.	Armstrong, Macartney & Ogle's Rep., Nisi Pr., Irel. 1 vol.
Arm. & T.	Armstrong & Trevor's Rep. of R. v. O'Connell, Dub., 1844.
Bail.	Bailey's Reports, South Carolina, 1828—1832. 2 vols. (B.)
Ball & B.	Ball & Beatty's Reports, Chancery, Ireland. 2 vols.
Batty	Batty's Reports, King's Bench, Ireland. 1 vol.
Bay	Bay's Reports, South Carolina, 1783—1804. 2 vols. (B.C.)
Bell, Dig.	Bell's Digest of the Laws of Scotland.
Bibb	Bibb's Reports, Kentucky, 1808—1817. 4 vols. (D.)
Binn.	Binney's Reports, Pennsylvania, 1799—1814. 6 vols. (A.)
Bland, Ch.	Bland's Chancery Rep., Maryland, 1811—1830. 2 vols. (C.)
Blackf.	Blackford's Reports, Indiana, 1817—1838. 4 vols. (C.D.)
Browne	Browne's Reports, Pennsylvania, 1806—1814. 2 vols. (C.)
Burnet, Cr. L. ..	Burnet on Criminal Law of Scotland.

¹ A list of the ordinary abbreviations used in English law is commonly known, and can, at any rate, be found in the catalogues of many law publishers.

ABBREVIATIONS.	NAME OF WORK, ETC.
Caines	Caines's Reports, New York, 1803—1805. 3 vols. (A.)
City Hall Rec. ..	New York Recorder, containing Reports of Cases in City Courts from 1816 to 1821. 6 vols.
Com.	Commonwealth.
Conklin's Pr.	Conklin's Practice of Cts. of United States, New York, 1842.
Conn.	Connecticut Reports, by T. Day, 1814—1848. 15 vols. (B.)
Const. R.	Constitutional Rep., S. Carolina, 1812—1816. 2 vols. (B.C.)
Const. U.S. Amend.	Amended Constitution of the United States.
Cooke & Alc.	Cooke and Alcock's Rep., King's Bench, Ireland. 1 vol.
Cooke	Cooke's Reports, Tennessee, 1811—1814. 1 vol. (D.)
Cowen	Cowen's Reports, New York, 1823—1828. 9 vols. (A.)
Coxe	Coxe's Reports, New Jersey, 1790—1795. 1 vol. (C.)
Cranch	Cranch's Rep., Sup. Ct. of U.S., 1800—1815. 9 vols. (A.)
Crawf. & D., Abr. C.	Crawford and Dix's Abridged Cases in Ireland. 1 vol.
Crawf. & D., C. C.	Crawford and Dix, Irish Circuit Reports. 3 vols.
Cush.	Cushing's Rep. Supreme Court of Massachusetts. 9 vols.
Dall.	Dallas's Reports. Supreme Courts of United States, and Pennsylvania, 1790—1806. 4 vols. (A.)
Dane, Abr.	Dane's Abridgment, United States.
Day	Day's Reports, Connecticut, 1802—1810. 5 vols. (B.)
Deane, Verm. R. ...	Deane's Reports, Supreme Court of Vermont. 3 vols.
Dev.	Devereux's Rep., North Carolina, 1826—1834. 4 vols. (B.)
Dev. & B.	Devereux and Battle's Rep., North Carolina, 1834—1840. 4 vols. (B.)
Dickson, Ev.	Dickson on Evidence in Scotland. 2 vols. Edinburgh, 1855.
Drury, Ch. R.	Drury's Irish Chancery Rep., temp. Sugden, Ch. 1 vol.
Dru. & War.	Drury and Warren's Reports, Chancery, Ireland, 4 vols.
Ersk. Inst.	Erskine's Institutes of the Law of Scotland.
Fairf.	Fairfield's Reports, Maine, 1833—1835. 3 vols. (B.)
Fox & Sm.	Fox and Smith's Reports, King's Bench, Ireland. 2 vols.
Gall.	Garrison's Reports, United States, 1st Circuit Court, 1812—1815. 2 vols. (A.). Judge Story's Decisions.
Gill. & J.	Gill and Johnson's Rep., Maryland, 1829—1840. 10 vols. (B.)
Glassf. Ev.	Glassford on Evidence, Edinburgh, 1820.
Gr. Ev.	Greenleaf on Evidence.
Gray	Gray's Reports, Supreme Court of Massachusetts. 2 vols.
Greenl.	Greenleaf's Reports, Maine, 1820—1832. 9 vols. (B.)
Halst.	Halstead's Reports, New Jersey, 1821—1831. 7 vols. (C.)
Har. & G.	Harris and Gill's Rep., Maryland, 1826—1829. 2 vols. (B.)
Har. & M'Hen. ..	Harris and M'Henry's Rep., Maryland, 1790—1799. 4 vols. (D.)
Hardin	Hardin's Reports, Kentucky, 1805—1808. 1 vol. (D.)
Harr. & J.	Harris and Johnson's Reports, Maryland, 1800—1826. 7 vols. (B.)
Hawks	Hawks' Reports, North Carolina, 1820—1826. 4 vols. (C.)
Hayes	Hayes' Reports, Exchequer, Ireland. 1 vol.
Hayes & Jon.	Hayes and Jones' Reports, Exchequer, Ireland. 1 vol.

ABBREVIATIONS.	NAME OF WORK, ETC.
Hayw.	Haywood's Reports, North Carolina, 1789—1806. (C.)
Hen. & Munf.	Henning and Munford's Rep., Virginia, 1806—1809. 4 vols. (C.)
Heisk.	Heiskell, Tennessee, 1870—1874. 12 vols.
Hill, S. Car. R. ..	Hill's Reports, South Carolina, 1833—1835. 2 vols. (B.C.)
Hill, N. Y. R. ..	Hill's Reports, New York, 1841—1842. 3 vols. (B.)
Howard, S. Ct. R.	Howard's Rep., United States, Sup. Ct., from 1843. (A.)
Hume, Com.	Hume's Commentaries on Criminal Law of Scotland.
Humph.	Humphrey's Reports, Tennessee, 1839—1841. 2 vols. (D.)
Iredell	Iredell's Reports, North Carolina, 1840—1841. 1 vol. (C.)
Ir. C. L. R.	Irish Common Law Reports, 1849—1866. 17 vols. Formerly cited by Author as "Ir. Law R. N. S."
Ir. Ch.	Irish Chancery Reports, 1850—1866. 17 vols. Formerly cited by Author as "Ir. Eq. R. N. S."
Ir. Cir. R.	Irish Circuit Reports. 1 vol.
Ir. Eq. Rep.	Irish Equity Reports, 1838—1850. 13 vols.
Ir. L. T. Rep. ..	Irish Law Times Reports.
Ir. L. R.	Irish Law Reports (<i>i. e.</i> , Reports at Common Law), 1838—1850. 13 vols.
I. R. C. L.	Irish Reports, Common Law, 1867—1877.
I. R. Eq.	Irish Reports, Equity, 1867—1877.
J. J. Marsh.	J. J. Marshall's Rep., Kentucky, 1829—1832. 7 vols. (D.)
Jebb, C. C.	Jebb's Crown Cases Reserved, Ireland. 1 vol.
Jebb & B.	Jebb and Bourke's Rep., Queen's Bench, Ireland. 1 vol.
Jebb & Sy.	Jebb and Symes' Rep., Queen's Bench, Ireland. 2 vols.
Johns.	Johnson's Reports, New York, 1806—1823. 20 vols. (A.)
Johns. Ch. R.	Johnson's Chan. Rep., New York, 1814—1823. 7 vols. (A.)
Jones	Jones' Exchequer Reports, Ireland. 2 vols.
Jones & Lat.	Jones and Latouche's Rep., Chancery, Ireland. 3 vols.
Joy on Conf.	Joy on Confession in Criminal Cases, Dublin, 1842.
Kent, Com.	Kent's Commentaries, Boston, 1840.
Kirby	Kirby's Reports, Connecticut, 1785—1788. 1 vol. (D.)
L. R. (Ir.)	Law Reports for Ireland, 1878—1894. 33 vols. (vol. 33 current to end of 1894). Formerly cited by Author as "Ir. Law R."
LL., U. S.	Laws of the United States.
Lans. (N. Y.)	Lansing, Reports of Decisions in the Supreme Court of the State of New York. New York and Albany, 1869—1873. 7 vols.
Law Rec. 1st Ser. } or 2nd Ser. }	Law Recorder, 1st and 2nd Series. Irish. 10 vols.
Leigh, R.	Leigh's Reports, Virginia, 1829—1839. 9 vols. (B.)
Lloyd & G.	Lloyd and Goold's Ir. Chan. Rep., temp. Sugden, Ch. 1 vol.
Long. & T.	Longfield and Townsend's Rep. Exchequer, Ireland. 1 vol.
Louis.	Reports of Louisiana, 1830—1840. 16 vols. (B.)
McC.	McCord's Rep., South Carolina, 1820—1828. 4 vols. (B.C.)
McC., Ch. R.	McCord's Chancery Reports, South Carolina, 1825—1827. 2 vols. (B.C.)
McDouall, Inst. ..	McDouall's (Ld. Bankton) Institutes of Law of Scotland.
McNally, Ev.	McNally on Evidence, Ireland.
A. K. Marsh.	A. K. Marshall's Rep., Kentucky, 1817—1821. 3 vols. (D.)
J. J. Marsh.	J. J. Marshall's Rep., Kentucky, 1829—1832. 7 vols. (D.)

ABBREVIATIONS.	NAME OF WORK, ETC.
Mart.	Martin's Reports, Louisiana, 1809—1823. 12 vols. (B.)
Mart., N. S.	Martin's Reports, New Series, Louisiana, 1823—1830. 8 vols. (B.)
Mart., N. Car. R..	Martin's North Carolina Reports, 1778—1797. 1 vol. (D.)
Mart. & Y.	Martin and Yerger's Rep., Tennessee, 1825—1828. 1 vol. (D.)
Mason	Mason's Reports, United States, 1st Circuit Court, 1816—1830. 5 vols. (A.) Judge Story's Decisions.
Mass.	Reports of Massachusetts, 1804—1822. (A.)
Metc.	Metcalf's Reports, Massachusetts, 1840—1846. (A.)
Milw. Ec. Ir. R..	Milward's Eccles. Irish Rep., temp. Dr. Radcliffe.
Mo.	Missouri, 1821—1881. 74 vols.
Moll.	Molloy's Reports, Chancery, Ireland. 3 vols.
Monroe	Monroe's Reports, Kentucky, 1824—1828. 7 vols. (D.)
Morison	Morison's Scotch Reports.
Munf.	Munford's Reports, Virginia, 1810—1820. 6 vols. (C.)
Murph.	Murphey's Reports, North Carolina, 1804—1819. (C.)
N. York Civ. Code	The Code of Civil Procedure of New York, 1850.
N. York Cr. Code	The Code of Criminal Procedure of New York, 1850.
New Hamp.	Reports of New Hampshire, 1816—1843. (B.)
Nott & M'C.	Nott and M'Cord's Rep., S. Carolina, 1817—1820. 2 vols. (B.)
Ohio R.	Hammond's Ohio Reports, Ohio, 1821—1839. 9 vols. (D.)
Pa. St.	Pennsylvania State Reports, New York and Albany, 1845—1895. 165 vols. (Series still current.)
Paige	Paige's Chan. Rep., New York, 1828—1844. 10 vols. (B.)
Paine	Paine's Rep., United States, 2nd Circuit Court, 1810—1826. 1 vol. (B.)
Paine & D. Pr. ..	Paine and Duer's Practice of the Courts of the United States, New York, 1830.
Peck	Peck's Reports, Tennessee, 1822—1824. 1 vol. (D.)
Penning.	Pennington's Rep., New Jersey, 1806—1813. 2 vols. (C.)
Pennsylv.	Reports of Pennsylvania, 1829—1832. 3 vols. (B.)
Pet.	Peters' Rep., Supreme Courts of United States, 1827—1843. (A.)
Pet. C. C. R.	Peters' Circuit Courts Reports, United States, 3rd Circuit Court, 1803—1818. 1 vol. (B.)
Pick.	Pickering's Rep., Massachusetts, 1823—1840. 24 vols. (A.)
Porter	Porter's Reports, Alabama, 1834—1839. 9 vols. (D.)
Poth. Obl.	Pothier on Obligations, by Evans, Philadelphia ed., 1826.
R.	The Reports.
R. R.	Revised Reports.
Rand.	Randolph's Reports, Virginia, 1821—1828. 6 vols. (B.)
Rawle	Rawle's Reports, Pennsylvania, 1828—1835. 5 vols. (A.)
Rev. St.	Revised Statutes of different States in America.
Ridg. L. & S.	Ridgway, Lapp and Schoales' Rep., King's Bench, Irel. 1 vol.
Ridg. P. C.	Ridgway's Parliamentary Cases, Irish Parliament.
Riley	Riley's Law Cases, South Carolina, 1836—1837. 1 vol. (B.)
Sch. & Lef.	Schoales and Lefroy's Reports, Chancery, Ireland. 2 vols.
Serg. & R.	Sergeant and Rawle's Rep., Pennsylv., 1818—29. 17 vols. (A.)

ABBREVIATIONS.	NAME OF WORK, ETC.
Shepl.	Shepley's Reports, Maine, 1836—1841. 6 vols. (C.)
South.	Southard's Reports, New Jersey, 1816—1820. 2 vols. (C.)
Stair Inst.	Stair's Institutes of the Law of Scotland.
Story, R.	Story's Reports, United States, 1st Circuit, 1839—1845. 3 vols. (A.) Judge Story's Decisions.
Sumn.	Sumner's Reports, 1st Circuit Court of United States. Judge Story's Decisions. 1830—1839. 3 vols. (A.)
Swift, Dig.	Swift's American Digest.
Swift, Ev.	Swift's American Law of Evidence. Hartford.
Tait, Ev.	Tait on Evidence. Edinburgh, 1834.
U. S.	United States.
Verm.	Vermont's Reports, Vermont, 1826—1837. 9 vols. (B.)
Virg. Cas.	Virginia Cases, Virginia, 1789—1826. 2 vols. (D.)
Wall.	Wallis's Irish Chancery Reports, 1766—1791, 1 vol.; or in references to American Reports, either Wallace's United States Supreme Court Reports, Washington, 1863—1874. 23 vols.; or else Wallace's Circuit Court Reports, Philadelphia, 1801. 1 vol.
Wall, Jr.	Philadelphia. 1842—1862. 3 vols.
Wash.	Washington's Reports, Virginia, 1790—1796. 2 vols. (C.)
Wash. C. C. R. ..	Washington's Circuit Court Reports, United States, 3rd Circuit Court, 1803—1827. 4 vols. (B.)
Watts	Watts' Reports, Pennsylvania, 1832—1840. 10 vols. (A.)
Watts & S.	Watts and Sergeant's Rep., Pennsylv., 1841—1842. 3 vols. (A.)
Wend.	Wendall's Reports, New York, 1828—1841. (A.)
Whart.	Wharton's Reports, Pennsylvania, 1835—1840. 6 vols. (A.)
Wheat.	Wheaton's Rep., Superior Ct. of Un. States, 1816—1827. (A.)
Wheel. C. C.	Wheeler's Criminal Cases, New York. 3 vols. (D.)
Woodb. & M.	Woodbury and Minot's Reports, United States, 1st Circuit, 1845—1847. 2 vols. (A.)
Wright, R.	Wright's Reports, Ohio, 1831—1834. 1 vol. (D.)
Yeates	Yeates' Reports, Pennsylvania, 1791—1808. 4 vols. (B.)
Yerg.	Yerger's Reports, Tennessee, 1832—1837. 10 vols. (D.)

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A

PRACTICAL TREATISE
ON THE
LAW OF EVIDENCE.

PART I.
NATURE AND PRINCIPLES OF EVIDENCE.

CHAPTER I.

PRELIMINARY OBSERVATIONS.

§ 1.¹ EVIDENCE, in Law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any fact the truth of which is submitted to judicial investigation. It and the word *proof* are often used as synonyms. Accurate logicians, however, apply the latter term rather to the *effect* of evidence, than to evidence itself.² That high degree of evidence which is called *demonstration* excludes all possibility of error, and mathematical truth alone is susceptible of it. Such evidence cannot be obtained in the investigation of matters of fact, of which the most that can ever be said is, that there is no reasonable doubt concerning them.³ In trials of fact, therefore, the true question is not, whether it is possible that the testimony may be false, but whether there is sufficient probability of its truth; that is, whether the facts are proved by competent and satisfactory evidence.

§ 2.⁴ By *competent* (or admissible) evidence is meant that which the law requires, as the fit and appropriate proof in the particular case—such, for instance, as the production of a writing, where its contents are the subject of inquiry. By *satisfactory* evidence, sometimes called *sufficient* evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond

¹ Gr. Ev. § 1, in great part.

² See Wills, Cir. Ev. 2; Whately's Log. B. ii. c. iii. § 1; N. York Civ. Code, § 1660.

³ See Gamb. Guide, 121. Even of mathematical truths this writer justly

remarks, that, though capable of demonstration, they are admitted by most men solely on the *moral evidence* of general notoriety. Id. 196. See N. York Civ. Code, § 1662.

⁴ Gr. Ev. § 2, almost verbatim.

reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of an ordinary man; and so to convince him that he would venture to act upon that conviction in matters of important personal interest.¹ Questions respecting the competency or admissibility of evidence are entirely distinct from those which respect its sufficiency or effect. The former are exclusively within the province of the court; the latter belong exclusively to the jury.²

§ 3.³ The law of Evidence may be considered under three general heads, namely, *First*, The Nature and Principles of Evidence;—*Secondly*, The Object of Evidence, and the Rules which govern its production;—And, *Thirdly*, The Means of Proof, or the Instruments by which facts are established. We will also, in connection with the first head, consider what matters the courts will notice without proof; and in connection with the second and third heads, offer a few observations respecting the functions of the judge, as distinguished from those of the jury.

§ 3A. The present is a convenient place to mention that, by the Short Titles Act, 1892 (55 Vict. c. 10), short titles are given by statute to various Acts of Parliament (no less than 840), and that in the following pages this short title is stated between inverted commas; while the technical reference to the Act is also added, one or the other of these references being placed in brackets. Moreover, where a statement in the text is founded on a decision of the House of Lords, it is marked “H. L.,” while if founded on one of the Courts of Appeal or Privy Council, it is marked “C. A.” or “P. C.,” American cases being distinguished by the mark “(Am.,” Irish cases by “(Ir.),” and Scotch authorities as “(Sc.).” On the other hand, if it is founded on a *dictum* of a particular judge, his name is generally given in brackets after that of the case in which it was uttered (whether at *Nisi Prius* or in the course of a judgment given *in banc*). The date of every case which is important in estimating its value is given, and every known reference to it will be found in the Table of Cases.

¹ 1 St. Ev. 578.

Hayward, 1780 (Buller, J.).

² 1 Ph. Ev. *3; Carpenters' Co. v.

³ Gr. Ev. § 3, in great part.

* N.B.—This and similar references throughout the work are to “Phillipps and Arnould on Evidence.”

AMERICAN NOTES.

§ 1. **Evidence Defined.** — Evidence is that which shows. Legally, it is any fact which, either directly or mediately, tends to show to the mind the truth of a fact or proposition submitted to legal investigation. *Miles v. Edden*, 1 Duv. (Ky.) 270 (1864); *Schloss v. His Creditors*, 31 Cal. 201 (1866).

This definition includes both direct and circumstantial evidence, though as was said in an Iowa case (*Davenport v. Cummings*, 15 Ia. 219, (1863), "direct and positive evidence cannot with a critical regard to accuracy be spoken of as tending to prove an issue." If believed, it proves it.

"FACT." — The definition of "evidence" is obviously incomplete until the term "fact" used in defining it is itself defined. But "fact" is a term exceedingly difficult of definition. So difficult, that Sir James Fitz-James Stephen frankly abandoned it. In the first edition of the "Digest of the Law of Evidence" "fact" is defined as, "(1) Everything capable of being perceived by the senses; (2) Every mental condition of which any person is conscious; (3) Every part of a fact is itself a fact." As pointed out by a careful critic in the "Solicitors' Journal" (20 Sol. Journal, 869, (1876), this definition on application breaks down, — *e. g.* when attempted to be incorporated into the rule that evidence can only be given of facts in issue or facts relevant thereto. The "fact in issue" may be, for example, the existence of negligence, something clearly not "capable of being perceived by the senses," nor yet a "mental state of which a person is conscious." The force of this criticism was promptly recognised by Mr. Stephen, who contents himself in later editions with the statement that "fact includes the fact that any mental state of which any person is conscious exists."

This is apparently correct. What A.'s motive was in taking a mortgage or other transfer is a question of fact for the jury. *Wheelden v. Wilson*, 44 Me. 1 (1857); *Hamburg v. Wood & Co.*, 66 Tex. 168 (1886). For the same reason, "where the intent with which an act was done becomes material, it is proper to ask what it was." *Over v. Schiffling*, 102 Ind. 191 (1885); *Barnhart v. Fulkerth*, 93 Cal. 497 (1892); *Stevens v. Stevens*, 150 Mass. 557 (1889). So purpose is a question of fact. *Homans v. Corning*, 60 N. H. 418 (1880). The same cases hold that the person whose mental state is in question may properly testify as to it. But what a witness supposed A. thought as a motive for what A. did, is not a competent inquiry. *McHugh v. Dowd*, 88 Mich. 412 (1891); *Clement v. Cureton*, 36 Ala. 120 (1860). For a similar reason, a witness cannot be asked what A. "understood" by a designated parcel of real estate. "It must be difficult, to a degree bordering on the

impossible, for one person to testify, of his own knowledge, what the understanding of another was, to any given question. Such testimony is not to a fact; it must be merely an opinion, a conjecture as to a fact. Clearly this is as far as possible from legal testimony." *Gorham v. Gorham*, 41 Conn. 242 (1874).

Without attempting to define "fact" it may be suggested that the fundamental idea of "fact" is *that which exists*. As a thing cannot both be and at the same time not be, that which exists is the truth or fact of the matter. About this central thought of real or true existence, seem to cluster various uses, all associating with the word "fact" the ideas of truth, verity, accomplishment, actually happening, &c. Thus the Latin *factum* implies something done, an act or deed, something accomplished or done. The same word, *factum*, represents the instrument of conveyance which actually accomplished the transfer of land,—a "deed" as now called. Probably the phrase "free act and deed," like many other similar formulæ, is tautological, the words having nearly the same meaning. So an officer *de facto* is one in actual existence and discharging certain functions, whatever the rights of the *de jure* claimant may be. The colloquial use of the word "fact" will be most often found to embody the same conception of actual, real existence.

This conception of fact is by no means limited to tangible objects or those perceived by the senses. The phrase goes further, for the purpose of including mental processes. A thought, intention, emotion; any mental state or feeling; the truth of propositions phrased by the intellect, are matters of "fact." Whatever has existence is a fact. A question of fact is an inquiry into the truth or existence of something. It is of course only such as are in issue that are the subject of evidence.

It may be objected that under this definition the existence of a rule of law is a question of fact. Strictly speaking, such is the case. Where no special considerations are involved,—for example, in regard to the law of foreign countries or, in most instances, the law of other States of the Union,—this is recognised to be true. The existence of a rule of law of a foreign state or country is purely a question of fact, and appropriate evidence is introduced to prove it as a fact.

For especial reasons, the existence of the rules of law or standards of conduct which any domestic tribunal is established to enforce in its own jurisdiction, are not legally treated as other matters of fact, to be established by evidence, but are within the duty, knowledge, and perception of the judge, without need of the intervention of evidence. These matters of fact are separated from others and called matters of law, judicially noticed by the Court. See *post* p. 21^s.

Not only are such rules of law as are judicially noticed by the

Court excluded from the definition of fact, but also that part of the method of procedure which consists of reasoning from the facts established by evidence to the ultimate facts in issue. This is the faculty of judgment, the formation of an opinion. It is the same faculty as is exercised by the expert witness, and is, under these circumstances, called "Matter of opinion." Excluding from the entire list of facts as above illustrated those which are "Matter of law" and "Matter of opinion," we have a residuum which for want of a better name, or more precise definition, we call "Matter of fact."

A DOUBLE MEANING. — The phrase "evidence," even as used by the Courts, frequently presents a double meaning and more or less consequent confusion. The phrase is used to designate (1) The effect of relevant facts upon the facts in issue, — *e. g.*, the fact that A. has always paid for food ordered in his name by B. is said to be "evidence" of B.'s agency, if such agency be a fact in issue; (2) The statements of witnesses (or other means) by which these relevant facts are, in the first place, themselves sought to be established, — *e. g.*, in the above instance, statements of witnesses that they have been paid by A. under the circumstances mentioned, are also said to be "evidence" of such payment. Strictly speaking, the correct use of the phrase is the second. The probative effect of relevant facts is a matter of logical reasoning.

"EVIDENCE" and "PROOF." — "Evidence" and "proof" are so frequently confused as to emphasise the necessity of avoiding colloquial equivalents for technical words. The confusion is so common that a request for a ruling that a confessedly competent fact tending to show negligence in an action where negligence is in issue, "is not in itself *proof* of negligence" was held properly refused (*Perry v. Dubuque S. W. R. Co.* 36 Ia. 102 (1872), as a ruling calculated to mislead the jury. The Court say the instruction requested laid down "a correct legal principle. . . . In a legal sense *proof* signifies the effect of evidence as contradistinguished from *evidence* which implies the medium or means of proof. But in ordinary language the terms are used interchangeably."

So where a statute required "proof" of the publication of a notice and the Court allowed such publication to be proved by affidavit, the ruling was sustained on the ground that there is "an obvious difference between the words evidence and proof. The former, in legal acceptance, includes the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. The latter is the effect or result of evidence. These words are often used indifferently as expressive of the same thing."

"TESTIMONY." — A similar confusion follows the frequent use of the word "testimony" as synonymous with "evidence." They

are not synonymous. The distinction between them is well stated in *Lindley v. Dakin*, 13 Ind. 388 (1859). In the upper court the record recited that it embodied "all the testimony taken in the Court below." Held: that this could not be so construed as to amount to a statement of setting out the evidence. "Testimony is not synonymous with evidence. It is but a species or class or kind of evidence. Testimony is the evidence given by witnesses. Evidence is whatever may be given to the jury as tending to prove a case. It includes the testimony of witnesses, documents, admissions of parties, &c." This is cited with approval in *Harvey v. Smith*, 17 Ind. 272 (1861).

"CUMULATIVE EVIDENCE." — Some difference of opinion exists as to what evidence is to be considered cumulative. It is not disputed that cumulative evidence is correctly defined in *Parker v. Hardy*, 24 Pick. 246 (1837) as "additional evidence of the same kind to the same point." But the cases, while agreeing as to the rule, differ as to its proper application. Certain authorities hold that where a fact is in issue, any evidence tending to prove that fact is cumulative to any previous evidence tending to prove the same fact, even though the later evidence differs somewhat in its character from that which has preceded it. For example, the turning-point of the case being whether a certain bill of exchange had been left at a bank for collection before noon of a certain day, and evidence of time of the leaving being gone into by various witnesses, newly discovered evidence that a clerk, whose duty it was to register the receipt if received before noon, did not register the receipt until the following day, because not received until after noon, was held cumulative. *People v. Superior Court of the City of New York*, 10 Wend. 285 (1833). The Court intimate that evidence that the plaintiff had been in such other places at the time in question as to render the deposit impossible as and when he claimed it, would not be cumulative. So where the fact in issue is the existence of a partnership between the plaintiff and defendant, newly discovered evidence that certain foods were ordered sent in a way tending to show a partnership is said to be cumulative, because it "tends to support the fact or issue which was before attempted to be proved upon the trial." *Olmstead v. Hill*, 2 Ark. 346 (1840). So evidence tending to discredit a witness by showing contradictory statements is cumulative to other evidence tending to discredit the same witness in another way. *Glidden v. Dunlap*, 28 Me. 379, 383 (1848).

On the other hand, other American courts incline to the view that evidence tending to establish a fact in issue in a particular way is not cumulative to evidence tending to establish the same fact in a different way.

For example, the question being whether A. had authorised B.

to sell a certain horse, and much evidence other than admissions of the plaintiff having been received, a new trial was granted for newly discovered evidence that the plaintiff had admitted the authority in dispute. The Court, by *Morton, J.*, say, "This, therefore, is a new kind of evidence, and although it is additional to other evidence tending to prove the same position, yet it is not cumulative because it is of a different character tending to establish the same general result by proof of a new and distinct fact." *Parker v. Hardy*, 24 Pick. 246 (1837). The same result is reached in *Waller v. Graves*, 20 Conn. 305, 310 (1850), where, in an action of libel, and in support of the defence that the libellous language was inserted without the defendant's consent and without his knowledge, newly discovered evidence of an independent witness that he himself inserted the libellous matter, was held not cumulative to the defendant's denial that he used the libellous epithets in the article as written by him. *Church, C. J.*, speaking for the Court, says:—"There are often various distinct and independent facts going to establish the same ground on the same issue. Evidence is cumulative which merely multiplies witnesses to any one or more of the facts before investigated, or only adds other circumstances of the same general character. But that evidence which brings to light some new and independent truth of a different character, although it tend to prove the same proposition or ground of claim before insisted on, is not cumulative within the true meaning of the rule on this subject." As an instance of their meaning, the Court take the case of an executor resisting a claim based on an alleged note of the deceased, and after an adverse verdict discovering a receipt in full, or learning of the plaintiff's deliberate admission of payment. "There could be no question," they say, "in such a case, but a new trial should be granted, although the new facts go to prove the former ground of defence."

It would seem that the weight of reasoning was in favour of the position taken by the Massachusetts and Connecticut cases.

The extent to which cumulative evidence is admissible is discretionary with the Court. A party will not be permitted unduly to waste time by multiplying witnesses to the same fact.

§ 2. **Competent Evidence.**—Competent Evidence is that which is admissible, as tending to prove the existence or non-existence of facts in issue. The definition points to a central fact in the law of evidence, viz.;—that it is based upon *logic*. In fact, the modern trial is an appeal to the test of reasoning, as the result of a long historical development from other tests of truth, more mechanical, sacramental and formal, used by ancestors more or less remote. The rules of correct reasoning are at every turn regarded as essential to the due administration of judicial functions. The Court is charged with the duty of enforcing this rule of correct logical reasoning.

If its coadjutor in trials of fact, the jury, sees fit to depart from such a line of reasoning, whether under the influence of passion, prejudice, or other improper motive, it is the duty of the Court to correct the fault, even to the extent of nullifying a verdict which appears to have been reached under such influence. The duty is not, it will be observed, to enforce the particular reasoning which commends itself to the Court. It is sufficient that a line of correct reasoning has been adopted by the jury, even if the Court itself would have adopted a different one. If the verdict is justified on logical principles, it usually will stand. If the verdict is not so justified, it is the duty of the Court, in discharge of its responsibility to enforce the use of correct reasoning (even, as has been said, if not the Court's view of the particular line of correct reasoning it would adopt for itself), to set the verdict aside.

It naturally follows that a Court charged with the responsibility of insisting on the observance of the rules of logical reasoning will permit the jury, which it holds within these rules, to consider only such facts as meet the same requirement, *i. e.*, which have a logical tendency to establish the existence or non-existence of the fact or facts whose existence is in issue or in dispute. This rule is not only a restriction upon the admissibility of facts in evidence, but it also states the test which makes them admissible. As has been said, it is the fundamental rule of evidence that all facts which logically prove or disprove the existence of facts in issue, are admissible.

Consideration of the law of evidence so largely consists in examining the established exclusions of properly logical evidence, and the instances in which these exclusions themselves do not apply, that this first and principal rule of the law of evidence — that evidence logically tending to establish the issue is admissible — is frequently lost sight of. Unless a special reason be shown for excluding facts with a logically probative tendency, such facts are admissible.

RELEVANCY. — This logical relation of one fact to another, is termed "relevancy." Of this the law furnishes no test. The test is furnished by the ordinary principles of logic or a conscious perception of the relation. A legal definition of relevancy was indeed courageously attempted by Sir James Fitz-James Stephen in the first edition of the "Digest of the Law of Evidence," based largely on the relation of causation. This definition was abandoned. The amended definition seems free from objection. Two facts are relevant to each other when so related "that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non-existence of the other." (Dig. Law of Evid. Art. 1.)

THE RULE FURTHER EXAMINED. — Such being the fundamental rule of evidence, that all evidence logically probative is admissible,

the further law of evidence consists of excluding certain facts of the evidence otherwise admissible under this fundamental general rule. The law of evidence becomes, therefore, so to speak, a series of exclusions. These owe their existence principally to two lines of considerations,—(1) The necessity for trying cases within reasonable limits of time; (2) The presence of the jury. These two considerations may be examined briefly.

(1) **LEGAL RELEVANCY.**—The search for abstract truth, scientific or otherwise, is not usually limited in time. No fact relevant at all is too remotely relevant to deserve consideration. No pressing necessity usually exists that the precise fact should be ascertained this year or next year, or, indeed, within the next century. Under such conditions, logic is given its unimpeded course. All facts logically relevant demand and receive consideration.

But the course of trials in Courts of law by no means admits of such extended search into the minutiae of proof. The tribunal sits for a limited time, and frequently is called on to dispose of many contested matters within that period. The proceedings are expensive, both to parties litigant, to those awaiting their turn (often with witnesses held from gainful occupations by a compulsory process), and to the government through the pay of jurors, Court officers, &c. There is a recognised necessity that matters should be as speedily disposed of as the interests of justice will admit.

This consideration was neatly put by Rolfe, B., in *Atty-Gen. v. Hitchcock* (1 Exch. 91, (1847)). “The laws of evidence on this subject, as to what ought and what ought not to be received, must be considered as founded on a sort of comparative consideration of the time to be occupied in examinations of this nature, and the time which it is practicable to bestow upon them. If we lived for a thousand years, instead of about sixty or seventy, and every case were of sufficient importance, it might be possible, and perhaps proper, to throw a light on matters in which every possible question might be suggested, for the purpose of seeing by such means whether the whole was unfounded, or what portion of it was not, and to raise every possible inquiry as to the truth of the statements made. But I do not see how that could be; in fact, mankind find it to be impossible. Therefore some line must be drawn.”

(2) **FEAR OF THE JURY.**—A very distinctive feature of the English law of procedure, of which the law of evidence is part, lies in the fact that a jury frequently takes a share in the trial of causes. It involves no disparagement to the benefits, real or assumed, of the jury's presence to say that obvious dangers to the administration of justice have always been recognised as arising from it. The average jury is composed of men selected by chance from the general community, brought together for a short time and for a limited object, with minds usually entirely untrained in the dif-

ficult art of justly balancing the weight of conflicting statements. Jurymen, almost of necessity, are seldom given to reasoning with logical exactness, and are therefore apt to jump across logical chasms or breaks in a chain of proof; especially at times when sympathy or prejudice is aroused, or the fascinating process of adjusting or, as it were, dovetailing together separate pieces of evidence is nearly completed, and only fails for lack of a little imagination. Above all, the jury at all times has been, as is natural with so casual a tribunal, but little impressed with any feeling of responsibility for maintaining the integrity of legal rules or the influence of precedent in the administration of justice. It has accordingly usually manifested a strong tendency to overlook the more important remote consequences of maintaining a general rule for the purpose of relieving the hardship of individual cases.

EXCLUSIONS. — For these and similar reasons, the law of evidence excludes much evidence logically relevant, either (1) By applying a higher standard of relevancy than mere logic by requiring a certain high grade of probative effect, which may be called legal relevancy; and (2) By absolutely excluding certain facts both logically and legally relevant. What facts are so highly probative as to comply with the standard of legal relevancy cannot be reduced to a definite rule. The innumerable rulings on the subject will be found to depend rather upon the personal views and mental processes of particular judges than upon any more definite rule. The positive exclusions, on the other hand, generally admit of definite statement.

CHAPTER II.

MATTERS JUDICIALLY NOTICED, WITHOUT PROOF.¹

§ 4.² ALL civilised nations, as members of the great family of sovereignties, give political acknowledgment of each other's existence, and general public and external relations. After such acknowledgment by their own country, the existence and titles of a state are recognised by the public tribunals and functionaries of every nation in the civilised world.³ If, upon a civil war, one part of a nation separate from the other, and establish an independent government, the newly-formed nation cannot be recognised as such by the judicial tribunals of other nations, until it has been acknowledged by the sovereign power under which those tribunals are constituted.⁴ The judges of each nation are bound, *ex officio*, to know whether or not their government has recognised a nation as an independent state.⁵

§ 5. In like manner the judges must recognise, without proof, the common⁶ and statute law,⁷ and all legal claims, demands, estates, titles, rights, duties, obligations, and liabilities existing by

¹ See N. York Civ. Code, §§ 1705, 1706.

² Gr. Ev. § 4, in great part.

³ United States of America *v.* Wagner, 1867 (Ld. Chelmsford, Ch.). But the existence of States unacknowledged by the government must be proved by evidence, showing that they are associations formed for mutual defence, supporting their own independence, making laws, and having courts of justice. *Yrisari v. Clement*, 1826.

⁴ City of Berne *v.* Bk. of Eng., 1804.

⁵ Taylor *v.* Barclay, 1828. There it was falsely alleged in the bill, with the view of preventing a demurrer, that Guatemala, a revolted colony of Spain, had been recognized by Great Britain as an independent state; but the V.-C. took judicial notice that the allegation was false. See, however, contra, *Dolder v. Bk. of Eng.*, 1805, as to which *qy.*

⁶ Hein. ad Pand., L. xxii. t. iii. § 119.

⁷ R. *v.* Sutton, 1817; "The Interpretation Act, 1889" (52 & 53 V. c. 63), § 9. As to private Acts of Parl., see 8 & 9 V. c. 113, § 3, cited post, § 7.

the common law, or by any custom, or created by any statute;¹ the rules of equity, and all equitable estates, titles, rights, duties, and liabilities² (while whenever the rules of equity and of the common law differ, those of equity must prevail³); the law of nations, the law and custom of parliament, and the privileges and course of proceedings of each branch of the legislature;⁴ the prerogatives of the Crown,⁵ and the privileges of the royal palaces;⁶ the maritime law;⁷ the ecclesiastical law;⁸ the articles of war, whether in the naval,⁹ the marine, or the land service,¹⁰ including those made for the government of the forces in India,¹¹ as well as the auxiliary forces,—that is, the militia, the yeomanry, and the volunteers,¹²—and also the reserve forces;¹³ the rules of procedure made in pursuance of § 70 of the Army Act, 1881, “whether signified under the hand of a secretary of state” in relation to the army,¹⁴ or promulgated by the admiralty with respect to the marines;¹⁵ royal proclamations, such being acts of State;¹⁶ the

¹ 36 & 37 V. c. 66, § 24, sub-sect. 6; 40 & 41 V. c. 57, § 27, sub-sect. 6, Ir.

² See 36 & 37 V. c. 66, § 24, sub-sect. 4. See, also, as to Ireland, 40 & 41 V. c. 57, § 27, sub-sect. 4, Ir.

³ See 36 & 37 V. c. 66, § 25, sub-sect. 11. See, also, *Bustros v. White*, 1876, C. A.; and *Palmer v. Palmer*, 1885. See, also, as to Ireland, 40 & 41 V. c. 57, § 28, sub-sects. 11, 29.

⁴ *Lake v. King*, 1667; *Stockdale v. Hansard*, 1839; *Wason v. Walter*, 1869; *Cassidy v. Steuart*, 1841; *Case of the Sheff. of Middlx.* 1840; *Sims v. Marryat*, 1866; *Bradlaugh v. Gosset*, 1884.

⁵ *R. v. Elderton*, 1703.

⁶ *Id.*; *Winter v. Miles*, 1808; *Att.-Gen. v. Donaldson*, 1842. Hampton Court has ceased to have privileges as a royal palace, *Att.-Gen. v. Dakin*, 1869; *R. v. Ponsonby*, 1844.

⁷ *Chandler v. Grieves*, 1812.

⁸ 1 Roll. Abr. 526; 6 Vin. Abr. 496; *Sims v. Marryat*, 1866 (*Ld. Campbell*).

⁹ 29 & 30 V. c. 109 (“The Naval Discipline Act, 1866,” amended by “The Naval Discipline Act, 1884,” 47 & 48 V. c. 39).

¹⁰ See § 69 of “The Army Act, 1881” (44 & 45 V. c. 58). As to

printing of, and amendments to the above, see 48 V. c. 8, § 8. See, also, as to the Articles of War, § 179, sub-sects. 1, 20, of the same Act as to the Royal Marines. The latter articles, it is presumed—though the Act is silent on the subject—must be judicially noticed.

¹¹ *Id.*, § 180.

¹² *Id.*, §§ 175—178.

¹³ *Id.*, § 190, sub-sect. 9.

¹⁴ *Id.*, § 70, sub-sects. 1, 3, amended by 49 V. c. 8, § 5.

¹⁵ *Id.*, § 179, sub-sect. 6.

¹⁶ *Dupays v. Shepherd*, 1698 (*Ld. Holt*). In *Van Omeron v. Dowick*, 1809, *Ld. Ellenborough* refused to take notice of a proclamation, on the ground that the Gazette containing it was not produced. The latter case does not go the length of the marginal note, but simply decides that, when a judge’s memory is at fault, some document must be at hand to establish the fact he is called upon to notice. Copies of royal proclamations, if purporting to be printed by the Queen’s printer, are admissible by 8 & 9 V. c. 113, § 3; see post, § 7. They may be proved, also, in a variety of other ways. See 31 & 32 V. c. 37, § 2, cited post, § 1527.

general practice of conveyancers;¹ the custom of merchants,²—at least where such custom has been settled by judicial determinations,³—such, for example, as the lien which a vendor has on goods remaining in his possession for unpaid purchase-money;⁴ or the general lien of an innkeeper on all the property belonging to his guest for the entire amount of his bill;⁵ or the general lien of bankers and factors on the securities of their customers in their custody;⁶ or the practice of drawing bills of lading in sets, and of dealing with one of a set as representing the cargo independently

¹ Willoughby v. Willoughby, 1787 (Ld. Hardwicke); Doe v. Hilder, 1819; Doe v. Plowman, 1819; Rowe v. Grenfel, 1824 (Ld. Tenterden). Ld. St. Leonards, in 3 V. & P., 10th edit. (1839), at p. 28, observed (the passage does not appear in recent editions, in consequence of the chapter on the subject of Attendant Terms, having become of little practical importance), "It matters very little what is the opinion of any individual conveyancer; but the opinion of the conveyancers, as a class, is of the deepest importance to every individual of property in the state. Their settled rule of practice has, accordingly, in several instances been adopted as the law of the land, not out of respect for them, but out of tenderness to the numerous purchasers who have bought estates under their advice." See, also, Howard v. Ducane, 1823 (Ld. Eldon); Re Rosher, 1884 (Pearson, J.).

² Erskine v. Murray, 1728; Soper v. Dibble, 1696; Carter v. Downish, 1687; Williams v. Williams, 1693.

³ Barnett v. Brandao, 1843, where judicial notice was taken of the general lien of bankers on the securities of their customers in their custody, and Ld. Denman (pronouncing the judgment of the court) said, "The law merchant forms a branch of the law of England; and those customs, which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience, and for the benefit of trade and commerce: and when so adopted, it is unnecessary to plead and prove them. They are binding on all without proof. Ac-

cordingly we find that usages affecting bills of exchange and bills of lading, are taken notice of judicially"; and then gives as instances the judicial recognition of the general lien of factors and bankers. This judgment was afterwards reversed by the House of Lords (see Brandao v. Barnett, 1846), but that portion of it which relates to judicial notice of the general lien of bankers was affirmed. In Edie v. E. India Co., 1761, Mr. Just. Wilmot observed, "The custom of merchants is part of the law of England, and courts of law must take notice of it as such. There may, indeed, be some questions depending upon customs amongst merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon; yet that is only where the law remains doubtful, and even then the custom must be proved by facts, not by opinion only; and it must also be subject to the control of law." In support of the proposition that evidence can only be taken as to mercantile custom where the law is doubtful, the learned judge says, that Ld. Mansfield, with Denison and Foster, J.J.'s, rejected the testimony of witnesses to prove the usage, solely on the ground that the question had already been solemnly settled by two adjudications in the courts of law. See also Jones v. Peppercorn, 1859.

⁴ Imperial Bk. v. Lond. and St. Katherine's Dock Co., 1875 (Jessel, M.R.).

⁵ Mulliner v. Florence, 1878, C. A.

⁶ See cases cited ante, n. ³, supra, p. 5; also Lond. Chart. Bk. of Australia v. White, 1878.

of the rest;¹ or the usage among money dealers of treating scrip certificates payable to bearer, whether of a foreign Government or of a company, as negotiable instruments transferable on delivery;² or the custom of hotel-keepers holding their furniture on hire;³ the customs which regulate the special descent of gavelkind and borough English lands,⁴ and it seems any other custom incident to such tenures;⁵ the custom or law of the road, viz., that horses and carriages should respectively keep on the near or left side;⁶ and the following rules with respect to navigation,—first, that ships and steamboats, on meeting “end on, or nearly end on, in such a manner as to involve risk of collision,” should port their helms, so as to pass on the port, or left, side of each other; next, that steamboats should keep out of the way of sailing ships; and next, that every vessel overtaking another should keep out of its way.⁷ Every court will moreover take judicial notice of matters appearing in its own proceedings. Therefore, if in the course of a case it appear that an indictable conspiracy has been committed, it will take

¹ Sanders v. Maclean, 1883.

² Goodwin v. Robarts, 1876, H. L.; Rumball v. Metrop. Bk., 1877.

³ Crawcour v. Salter, 1881, C. A.

⁴ 1 Bl. Com. 76; Doe v. Scudamore, 1705; Crosby v. Hetherington, 1842 (Tindal, C.J.).

⁵ Rider v. Wood, 1855 (Wood, V.-C.), following Payne v. Barker, 1659. See also 36 & 37 V. c. 66, § 24, sub-sect. 6.

⁶ See Leame v. Bray, 1814, as to carriages, and Turley v. Thomas, 1837 (Coleridge, J.), as to saddle horses. See also 14 & 15 V. c. 92, § 13, Ir. The rule has been embodied by Professor Selwyn, in what an Etonian would call “Longs and Shorts:”—“Sed precor hoc posthac reminiscere, carpe sinistram: Dextram occurrenti linquere norma jubet.” In France the law of the road is different, and horses and carriages pass on the off side.

⁷ The Regulations for Preventing Collisions at Sea, containing the rules concerning lights, fog signals, steering and sailing, were embodied in a table issued originally under § 25 of 25 & 26 V. c. 63, since repealed by “The Merchant Shipping Act, 1894” (57 & 58 V. c. 60), which substitutes for it Id., § 418 (1), and of two Orders

in Council, dated respectively 11th August, 1884 (printed 9 P. D. 247), as to British ships and boats, and 14th August, 1879 (printed 4 P. D. 241), as to foreign ships. As to how these regulations are to be published and proved, see § 26 of the original Act, and for this § 419 (5) of “The Merchant Shipping Act, 1894,” is substituted; and by § 28 of the original Act (§ 419 (3) of “The Merchant Shipping Act, 1894”), any damage arising from the non-observance of these Regulations shall be *prima facie* presumed to have been caused by the wilful default of the person in charge of the deck of such ship. See post, § 206; Gen. St. Navig. Co. v. Hedley, 1869; Dryden v. Allix, 1863; The Concordia, 1866; The Spring, 1866. As to the prior law, see Chadwick v. City of Dublin St. Packet Co., 1856; Smith v. Voss, 1857; Zugasti v. Lamer, 1858; Maddox v. Fisher, 1851; Williams v. Gutch, 1857; Tuff v. Warman, 1857. See Morrison v. Gen. St. Navig. Co., 1852; Gen. St. Navig. Co. v. Morrison, 1856; Gen. St. Navig. Co. v. Mann, 1855; Lawson v. Carr, 1856; Churchward v. Palmer, 1856; La Plata, 1855; Morgan v. Sim, 1858.

judicial notice of the fact though it be not pleaded.¹ It will also judicially notice the particular customs which have been tried, determined, and recorded in such court.² The customs of London, which have been certified by the recorder,³ such, for example, as the custom of foreign attachment⁴—the custom that every shop is a market overt for the sale of goods of the same kind as usually sold there⁵—the custom that married women may be sole traders⁶—and the custom which defines the nature of a liveryman's office,⁷—will be judicially noticed by the courts in which the certificates are recorded.⁸ No one court can, however, take notice of a custom merely because it has been certified to another.⁹ Neither can judicial notice be taken of the usages prevalent among mining partnerships conducted on the cost-book principle, for the judges cannot determine without evidence the meaning of the term "cost-book principle."¹⁰ Nor, again, will the courts take cognisance of the laws, usages, or customs of a foreign state; and even the laws of the colonies,¹¹ or Jersey,¹² Guernsey, or Scotland, must be proved as facts,¹³ unless steps have been taken, either under the

¹ *Scott v. Brown*, 1892.

² See *Crawcour v. Salter*, 1881, C. A.

³ *Crosby v. Hetherington*, 1842; *Bruin v. Knott*, 1842; *Blacquiére v. Hawkins*, 1780 (Ld. Mansfield). See *Blunt v. Lack*, 1857. Uncertified customs of London must be proved in the High Court, though they will be judicially noticed in the City Courts: *Stainton and wife v. Jones*, 1779 (Ld. Mansfield). So, also, the Q. B. Div. in Ireland will not judicially notice a custom of the Lord Mayor and Sheriff's Court in Dublin, unless certified by the recorder: *Simmonds v. Andrews*, 1839 (Ir.).

⁴ Certified by Starkey in 22 Ed. 4. See 1 Roll. Abr. 554 K 5; *Bruce v. Wait*, 1840; *Crosby v. Hetherington*, 1842; *Westoby v. Day*, 1853.

⁵ Certified by Sir E. Coke, 5 Rep. 83 b (rather fuller, as L'Evesque de Worcester's case, 1594). See *Lyons v. De Pass*, 1840. See, also, *Crane v. London Dock Co.*, 1864; *Hargreave v. Spink*, 1892.

⁶ *Lavie v. Phillips*, 1765. Local customs, as that of carting whores in London, and foreign attachment

in Bristol, Exeter, Liverpool, and Chester, need not be set out on the record of a court of the city, as they are judicially noticed in the courts and of the respective cities (1 Dougl. 380, n. 96), as they also will be in a court of error. See *Bruce v. Wait*, 1840.

⁷ *King v. Clerk*, 1695; cited (*Parke, B.*) in *Piper v. Chappell*, 1845.

⁸ The customs as to distribution of the personal estate of intestate free-men in London, York, and other places, are abrogated by 19 & 20 V. c. 94.

⁹ *Piper v. Chappell*, 1845 (*Parke, B.*).

¹⁰ In re *Bodmin United Mines Co.*, 1856.

¹¹ *Prowse v. The European & Amer. St. Shipping Co.*, 1860.

¹² *Brenan's case*, 1847 (*Patteson, J.*).

¹³ *Urquhart v. Butterfield*, 1888, C. A.; *Dalrymple v. Dalrymple*, 1811; *Mostyn v. Fabrigas*, 1774 (Ld. Mansfield); *Sussex Peer. case*, 1844; *Male v. Roberts*, 1800 (Ld. Eldon); *R. v. Povey*, 1855; *Woodham v. Ed-*

British Law Ascertainment Act, 1859,¹ or under the Foreign Law Ascertainment Act, 1861,² to obtain a legal opinion on the subject from a superior court of the country whose laws are under dispute.³ The laws of Ireland being substantially the same as those of England, except where varied by statute, a very able judge has suggested that the English courts would probably judicially recognise them.⁴

§ 6. The courts will also judicially notice the following seals:— the Great Seal of the United Kingdom, and the Great Seals of England, Ireland, and Scotland respectively; ⁵ the Queen's Privy Seal and Privy Signet, whether in England, Ireland, or Scotland; ⁶ the Wafer Great Seal, and the Wafer Privy Seal, framed under the Crown Office Act, 1877; ⁷ the seal, and the privy seal, of the duchy of Lancaster; the seal, and the privy seal, of the duchy of Cornwall; ⁸ the seals of the old superior courts of justice; and of the Supreme Court, and its several Divisions; the seals of the old High Court of Admiralty, whether for England or Ireland; ⁹ of the Prerogative Court of Canterbury; ¹⁰ and of the Court of the Vice-Warden of the Stannaries; ¹¹ the seals of all courts constituted by Act of Parliament, if seals are given to them by the Act; ¹² amongst which are the seals of the Court for Divorce and Matrimonial causes in England; ¹³ of the Court for Matrimonial causes and matters in Ireland; ¹⁴ of the Central Office of the Royal Courts of Justice, and of its several Departments; ¹⁵ of the Principal Registry, and of the several district Registries of the Supreme Court of Judicature; ¹⁶ of the Principal Registry, and of the several district Registries of the old Court of Probate in

wards, 1836; *Wey v. Yally*, 1704; *Story*, *Confl.* § 637, and cases cited in n. See also post, §§ 48, 1423—1425.

¹ 22 & 23 V. c. 63.

² 24 & 25 V. c. 11.

³ See *Lord v. Colvin*, 1860; *Login v. Princess of Coorg*, 1862.

⁴ *Reynolds v. Fenton*, 1846 (*Maule, J.*, explaining *Ferguson v. Mahon*, 1839).

⁵ *Lord Melville's case*, 1806.

⁶ *Foggassa's case*, 1349, cited in *Olive v. Guin*, 1658; *Lane's case*, 1587.

⁷ 40 & 41 V. c. 41, § 4.

⁸ 26 & 27 V. c. 49, § 2.

⁹ *Green v. Waller*, 1703; 24 & 25 V. c. 10, § 14, now repealed by 44 & 45 V. c. 59; 30 & 31 V. c. 114, § 21, *Ir.*

¹⁰ *Kempton v. Cross*, 1735.

¹¹ 6 & 7 W. 4, c. 106 ("The Stannaries Act, 1836"), § 19.

¹² *Doe v. Edwards*, 1839.

¹³ 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), § 13.

¹⁴ 33 & 34 V. c. 110, § 11, *Ir.*

¹⁵ *R. S. C.* 1883, *Ord.* LXI. rr. 1, 6, 7.

¹⁶ 36 & 37 V. c. 66, § 61.

England¹ and of the present Court of Probate in Ireland;² of the old³ and new Courts of Bankruptcy;⁴ of the Insolvent Debtors' Court,⁵ now abolished; of the Court of Bankruptcy and Insolvency in Ireland⁶ (which, since the 6th of August, 1872, has been called "The Court of Bankruptcy in Ireland");⁷ of the Landed Estates Court, Ireland;⁸ of the Record of Title Office of that Court;⁹ and of the County Courts.¹⁰ Courts of law also judicially notice the seal of the corporation of London.¹¹ The seal of a foreign or colonial notary-public will not generally be judicially noticed, although such a person is an officer recognised by the whole commercial world.¹² Various statutes render different other seals admissible in evidence without proof of their genuineness.¹³

¹ 20 & 21 V. c. 77 ("The Court of Probate Act, 1857"), § 22.

² 20 & 21 V. c. 79, § 27, Ir.

³ See 24 & 25 V. c. 134, § 204, and 32 & 33 V. c. 71, § 109.

⁴ See 46 & 47 V. c. 52, § 137; and the Bankruptcy Rules of 1883, r. 12. See, also, r. 14, as to seals on "office copies."

⁵ *Doe v. Edwards*, 1839.

⁶ 20 & 21 V. c. 60, § 362, Ir.

⁷ 35 & 36 V. c. 58, § 6, Ir.

⁸ 21 & 22 V. c. 72 ("The Landed Estates Court (Ireland) Act, 1858"), § 8, Ir.

⁹ 28 & 29 V. c. 88, § 56, Ir.

¹⁰ 51 & 52 V. c. 43, § 180.

¹¹ *Doe v. Mason*, 1793 (Ld. Kenyon).

¹² *Re Earl's Trusts*, 1858; *Re Davis's Trusts*, 1869 (as to seal of a foreign notary public); *Nye v. Macdonald*, 1870 (as to seal of colonial notary public); see, however, *contra*, *Anon.*, 1799; *Hutcheon v. Mannington*, 1802; *Cole v. Sherard*, 1855; and *Furnell v. Stackpoole*, 1829 (Ir.).

¹³ Such as the seals of the Local Government Board for England (34 & 35 V. c. 70, § 5); or Ireland (35 & 36 V. c. 69, § 4, Ir.); of the late Poor Law Board, 10 & 11 V. c. 109 ("The Poor Law Board Act, 1847"), § 5; 1 & 2 V. c. 56 ("The Poor Relief (Ireland) Act, 1838"), § 121, Ir.; 10 & 11 V. c. 90 ("The Poor Relief (Ireland) Act, 1847"), § 3, Ir.; of the late Local Boards of Health (11 & 12 V. c. 63, § 35; 21 & 22 V. c. 98, s. 4);

and of Urban Sanitary Authorities (38 & 39 V. c. 55, § 7) and Joint Sanitary Boards (38 & 39 V. c. 55, § 280; 41 & 42 V. c. 52, § 13, Ir.); of the now abolished Commissioners for the Sale of Encumbered Estates in Ireland (12 & 13 V. c. 77, § 2, Ir.; see 21 & 22 V. c. 72, § 23, Ir.); of the Land Registry Office in England (see 25 & 26 V. c. 53, § 123; see also 38 & 39 V. c. 87, § 107), whether established under the Act of 1862 or under that of 1875; of the District Registry Offices created under the Act last referred to (38 & 39 V. c. 87, § 120); of the Office for the Registration of Assurances of Lands in Ireland (13 & 14 V. c. 72, § 45, Ir.); of the Irish Land Commission (44 & 45 V. c. 49, § 42, Ir.); of the General Register Office in England (6 & 7 W. 4, c. 86, § 38; see 3 & 4 V. c. 92, § 9), or Ireland (26 & 27 V. c. 11, § 5, Ir.); of the Charity Commissioners for England and Wales (16 & 17 V. c. 137, § 6; and see 18 & 19 V. c. 124, § 4, amended by 50 & 51 V. c. 49, and § 5 thereof as to copies and certified extracts, and the presumption that sealed copies are originals); of the Railway Commissioners (51 & 52 V. c. 25, § 2); of the Commissioners of Her Majesty's Works and Public Buildings (15 & 16 V. c. 28 ("The Commissioners of Works Act, 1852"), § 1; 37 & 38 V. c. 84, § 2); of the Board of Agriculture, which, speaking generally, now discharges the duties of the old Inclosure Commis-

§§ 7—8. The Documentary Evidence Act, 1845¹ extended the principle of admitting in evidence official documents without formal proof, to a numerous class of cases. That statute enacts, that “whenever *by any Act now in force or hereafter to be in force*, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively *purport* to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence.” By sect. 2,

sioners, Copyhold Commissioners, and Tithe Commissioners (45 & 46 V. c. 38; (see 52 & 53 V. c. 30 (“The Board of Agriculture Act, 1889”), especially § 6, and see also “The Settled Land Act, 1882” (45 & 46 V. c. 38), amended by “The Settled Land Act, 1884” (47 & 48 V. c. 18)); of the respective Commissioners for the Universities of Oxford and Cambridge (40 & 41 V. c. 48, §§ 4, 9); of the Prison Commissioners for England, and of the General Prisons Board for Ireland (40 & 41 V. c. 21, § 6, and c. 49, § 4, Ir.); of the special Commissioners for Irish Fisheries (26 & 27 V. c. 114, § 33, Ir.; continued by 31 & 32 V. c. 111; and amended by 32 & 33 V. c. 92, Ir.); of the Commissioners of Public Works in Ireland, at least for the purposes of the Drainage Acts (26 & 27 V. c. 88, §§ 3, 5, Ir.; 29 & 30 V. c. 49, § 21, Ir.), and of “The Settled Land Act, 1882” (45 & 46 V. c. 38, §§ 48, 65, sub-sect. 9); of the office

established under “The Patents, Designs, and Trade Marks Act, 1883” (46 & 47 V. c. 57, § 84); and of the Record Office, whether in England (1 & 2 V. c. 94 (“The Public Record Office Act, 1838”), § 11) or in Ireland (30 & 31 V. c. 70, § 18, Ir.). In all proceedings, too, under the winding-up clauses of the Companies Act, 1862, the seal of any office of the Court of Chancery, or Bankruptcy, in England or in Ireland, of the Court of Session in Scotland, or of the Court of the Vice-Warden of the Stannaries, when appended to any document made, issued, or signed under those clauses, or any official copy thereof, must be judicially noticed (25 & 26 V. c. 89, § 125).

¹ 3 & 9 V. c. 113. The author naturally felt satisfaction in referring to this statute, as he originally suggested to the Law Amend. Soc. the alterations embodied therein, and prepared the bill founded on them, which was carried by Ld. Brougham.

"all courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take *judicial notice* of the signature of any" judge of the Supreme Court of Judicature,¹ "provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document." By sect. 3, "all copies of private and local and personal Acts of Parliament not public Acts, if *purporting* to be printed by the Queen's printers, and all copies of the journals of either house of Parliament, and of royal proclamations, *purporting* to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed."²

§ 9. As to colonial *laws*, an Act of 1865³ provides that "the certificate of the clerk or other proper officer of a legislative body in any colony, to the effect that the document to which it is attached is a true copy of any colonial law assented to by the Governor of such colony, or of any bill reserved for the signification of Her Majesty's pleasure by the said Governor, shall be *prima facie* evidence that the document so certified is a true copy of such law or bill, and, as the case may be, that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the Governor; and any proclamation purporting to be published by authority of the

¹ "The Judicature Act, 1873" (36 & 37 V. c. 66).

² By § 4, forgery or false printing any of the documents referred to above (or, by 31 & 32 Vict. c. 37, § 4, cited post, § 1527 in note, any proclamation) is made a felony, punishable by penal servitude, or imprisonment for not less than a year; and it also is provided that, "whenever any such document as before mentioned shall have been received in evidence by virtue of this Act, the court, judge, commissioner, or other person officiating judicially who shall have admitted the same, shall, on the request of any party against whom the same is so received, be authorised, at its

or at his own discretion, to direct that the same shall be impounded, and be kept in the custody of some officer of the court or other proper person, until further order touching the same shall be given, either by such court, or the court to which such master or other officer belonged, or by the persons or person who constituted such court, or by some one of the equity or common law judges of the superior courts at Westminster, on application being made for that purpose." § 5 enacts, that the Act shall not extend to Scotland. See 24 & 25 V. c. 98 ("The Forgery Act, 1861"), §§ 27—29.

³ 28 & 29 V. c. 63 ("The Colonial Laws Validity Act, 1865"), § 6.

Governor in any newspaper in the colony to which such law or bill shall relate, and signifying Her Majesty's disallowance of any such colonial law, or Her Majesty's assent to any such reserved bill as aforesaid, shall be *prima facie* evidence of such disallowance or assent."

§ 10. As to foreign and colonial *documents*, Lord Brougham's Evidence Act of 1851¹ enacts, that "all proclamations, treaties, and other acts of state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice, in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies, or by copies authenticated as hereinafter mentioned: that is to say, if the document sought to be proved be a proclamation,² treaty, or other act of state, the authenticated copy, to be admissible in evidence, must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or any affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy, to be admissible in evidence, must purport either to be sealed with the seal of the foreign and colonial court to which the original document belongs, or in the event of such court having no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said court; and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the

¹ 14 & 15 V. c. 99 ("The Evidence Act, 1851"), § 7.

² See § 365 of "The Merchant Shipping Act, 1894" (57 & 58 V.

c. 60), and 14 & 15 V. c. 99 ("The Evidence Act, 1851"), as to proof of proclamations by governors of colonies under the first-named Act.

seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement."

§ 11. The Commissioners for Oaths Act, 1889,¹ enables affidavits, &c., to be sworn abroad before consuls, &c.

§ 12. Order XXXVIII. of the R. S. C., 1883, provides, in Rule 6, that "all examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court, and also acknowledgments required for the purpose of enrolling any deed in the Central Office, may be sworn and taken in Scotland, or Ireland, or the Channel Islands, or in any colony, island, plantation, or place *under the dominion of Her Majesty in foreign parts*, before any judge, court, notary public, or person lawfully authorised to administer oaths² in such country, colony, island, plantation, or place respectively, or before any of Her Majesty's consuls or vice-consuls³ in any foreign parts out of Her Majesty's dominions, and the judges and other officers of the High Court shall *take judicial notice* of the *seal* or *signature*, as the case may be, of any such court, judge, notary public,⁴ person, consul, or vice-consul, attached, appended, or subscribed to any such examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or to any other deed or document."⁵

§ 13. Again, the Bankruptcy Act for Scotland⁶ (passed in 1856) facilitates the proof of certain Scottish judicial documents by enacting, in § 174, that "all deliverances,"—which term includes all orders, warrants, judgments, decisions, interlocutors, or decrees under that Act,⁷—"purporting to be signed by the Lord Ordinary, or by any of the judges of the Court of Session, or by the sheriff

¹ 52 V. c. 10, post, Vol. II.

² In *Baillie v. Jackson*, 1853, the Lords Justices refused to take judicial notice of the signature of the Registrar of Deeds in St. Vincent to a certificate, he admittedly having no authority to administer an oath.

³ If there be no consul or vice-consul accessible, an affidavit made in foreign parts may be sworn before a notary public. *Cooke v. Wilby*, 1884 (*Chitty, J.*).

⁴ See ante, p. 9, n. 12.

⁵ See "The Commissioners for Oaths Act, 1889" (52 V. c. 10). And see, also, *Brooke v. Brooke*, 1881 (*Fry, J.*). Similar clauses to the rule above are also contained in "The Court of Admiralty (Ireland) Act, 1867" (30 & 31 V. c. 114, § 57, Ir.), and "The Matrimonial Causes (Ireland) Act, 1871" (34 & 35 V. c. 49, § 17, Ir.).

⁶ 19 & 20 V. c. 79.

⁷ § 4.

[or sheriff substitute],¹ as well as all extracts or copies thereof, or from the books of the Court of Session, or the Sheriff Court, purporting to be signed or certified by any clerk of court, or extracts from or copies of registers purporting to be made by the keeper thereof, or extractor, shall be judicially noticed by all courts and judges in England, Ireland, and Her Majesty's other dominions, and shall be received as *prima facie* evidence, without the necessity of proving their authenticity or correctness, or the signatures appended, or the official character of the person signing, and shall be sufficient warranty for all diligence and execution by law competent."

§ 14.² In America, the signature of the Chief of the Executive of the State is recognised without proof.³ In Louisiana, also, the signatures of executive and judicial officers to all official acts are similarly treated.⁴ The English doctrine on this subject is difficult of definition. On the one hand, judicial notice will be taken of the royal sign manual,^{4a} and of matters stated under it; of matters stated in the certificate of a principal Secretary of State,^{4a} and of the signatures of the judges of the Supreme Court of Judicature, and of the old superior equity and common law judges, if appended to any judicial or official document.⁵ The legislature has moreover provided that judicial notice shall be taken of the signatures of the judges, commissioners and registrars of the old courts,⁶ and of the judges and registrars of the Courts⁷ of Bankruptcy in England, and of the judges, registrars, and chief clerks of the Court of Bankruptcy and Insolvency, now called the Court of Bankruptcy,⁸ in Ireland;⁹ and has also directed that in all proceedings under the winding-up clauses of the Companies Act, 1862, judicial notice shall be taken of the signatures of the officers of the old Courts of

¹ 19 & 20 V. c. 79, § 4.

² Gr. Ev. § 6, in part, as to first four lines.

³ *Jones v. Gale's Exors.*, 1817 (Am.).

⁴ *Id.*; *Wood v. Fitz*, 1820 (Am.).

^{4a} *Mighell v. Sultan of Johore* (1893), see also post, § 1381; *Lord Melville's Case* (1806); *R. v. Miller* (1772), and *R. v. Gully* (1773). In neither of the cases last-named was

any question raised as to the necessity of proving the signature to be genuine.

⁵ 8 & 9 V. c. 113, § 2, ante, § 7.

⁶ 24 & 25 V. c. 134, § 204; 32 & 33 V. c. 71, § 109.

⁷ 46 & 47 V. c. 52, § 137, cited ante, p. 9, n. 4.

⁸ 35 & 36 V. c. 58, § 6, *Ir.*

⁹ 20 & 21 V. c. 60, § 362, *Ir.*

Chancery in England or Ireland, or of the Courts of Bankruptcy in England or Ireland, or of the Court of Session in Scotland, or of the registrar of the court of the Vice-Warden of the Stannaries, whenever such signatures are subscribed to any document made, issued, or signed under such clauses, or any official copy thereof,¹ and that the signatures attached to certain other documents rendered admissible by statute, need not be proved.^{1a} On the other hand, it has been said that the Courts would probably not recognise the signatures of the Lords of the Treasury to their official letters.² Many bodies are, too, by particular statutes, created corporations and given a seal, for instance, County Councils;⁵ yet in each such case the seal must, in the absence of statutory provision that judicial notice shall be taken of it, be formally proved.⁶

§ 15. The judges will take notice of the *London, Dublin, or Edinburgh Gazette* on its mere production, and it is unnecessary to prove that it was bought at the office of the Queen's printer, or to offer any evidence as to whence it came.⁷

§ 16.⁸ It is unnecessary to prove facts which may certainly be known from the invariable course of nature; such as that a man is not the father of a child, where non-access is already proved until within six months of the woman's delivery.⁹ Nor is it necessary to prove the course of time,¹⁰ or of the heavenly bodies.¹¹ Public divisions of time, too, need not be proved, such as the ordinary public

¹ 25 & 26 V. c. 89, § 125.

^{1a} 8 & 9 V. c. 113, § 1, ante, § 7. A partial list of the more important of these documents will be given in Part iii. Ch. iv., on Public Documents. In practice, no proof is required of the handwriting of the governor of Holloway prison (25 & 26 V. c. 104, § 12), which for all purposes of law is now regarded as the Queen's Prison. See *Alcock v. Whatmore*, 1840; *Short v. Williams*, 1835; *Fogarty v. Smith*, 1833.

² *R. v. Jones*, 1809 (Ld. Ellenborough). See 12 & 13 V. c. 89 ("The Treasury Instruments (Signature) Act, 1849"), cited post, § 1106; and 31 & 32 V. c. 37, cited post, § 1527.

⁵ 51 & 52 V. c. 41 ("The Local Government Act, 1888"), § 79. No

seal is given to parish councils, though they are incorporated. See 56 & 57 V. c. 73 ("The Local Government Act, 1894"), § 3, sub-sect. 9.

⁶ See, further, post, § 87.

⁷ *R. v. Forsyth*, 1814; 31 & 32 V. c. 37, §§ 2, 5, cited post, § 1527. See *R. v. Holt*, 1793. The case *R. v. Wallace*, 1865 (Ir.), can no longer be relied upon. See post, § 1527.

⁸ Gr. Ev. § 5, in part.

⁹ *Heathcote's Divorce*, 1851, H. L.; *R. v. Luffe*, 1807.

¹⁰ See *Bury v. Blogg*, 1848.

¹¹ However, in *Collier v. Nokes*, 1849, Wilde, C.J., is reported to have held that he could not judicially notice at what hour the sun set in the month of November. See, also, *Tutton v. Darke*, 1860 (Pollock, C. B.). See qu. ?

fasts and festivals;¹ the commencement or ending of the legal sittings;² the coincidence of the years of the reign of any sovereign of this country with the years of our Lord;³ the coincidence of days of the week with days of the month;⁴ the order of the months;⁵ the meaning of the word "month."⁶ The meaning of words in the vernacular language⁷ need not be proved; the word "time," for instance, unless specifically stated, indicating in Great Britain "Greenwich mean time," and in Ireland "Dublin mean time";⁸ and the word "distance" being, except under special circumstances, taken to mean distance measured as the crow flies.⁹ Nor, again, need formal proof be given as to the legal weights and measures;¹⁰ nor the positive value of the coin of the realm;¹¹ nor its relative value at different periods of time;¹² nor matters of history affecting the whole public.¹³

§ 17.¹⁴ Courts also recognise the principal geographical divisions.

¹ 6 Vin. Abr. 492, pl. 8—44.

² 6 Vin. Abr. 490, pl. 32.

³ *Holman v. Burrow*, 1702; *R. v. Pringle*, 1840.

⁴ 6 Vin. Abr. 492, pl. 6, 7, 8; *Hoyle v. Ld. Cornwallis*, 1720; *Page v. Faucet*, 1591; *Harry v. Broad*, 1704; *Brough v. Parkins*, 1703 (*Ld. Holt*). Thus the court is bound judicially to notice what days of the month fall on Sundays: *Hanson v. Shackelton*, 1835; *Pearson v. Shaw*, 1844.

⁵ *R. v. Brown*, 1828.

⁶ This formerly, at common law and in equity (see *Cons. Ord. Ch.* 1860, *Ord. XXXVII. i. 10*, now annulled), used to mean four weeks, but meant a calendar month when used in the ecclesiastical courts (*Bluck v. Rackman*, 1846 (*Knight-Bruce, V.-C.*); *Man v. Ricketts*, 1845 (*Lord Lyndhurst*); *Simpson v. Margitson*, 1847; *Johnstone v. Hudleston*, 1825 (*Bayley, J.*)); in mercantile transactions in the city of London (*Turner v. Barlow*, 1863 (*Erle, C.J.*)); or in bills of exchange or promissory notes (45 & 46 *V. c. 61*, § 14, sub-sect. 4, and § 89); or in any statute passed after the year 1850 (*The Interpretation Act*, 1889, of 52 & 53 *Vict. c. 63*, § 9). And month, when used in the Rules of the Supreme Court (*Ord. LXIV. r. 1*), or in any judgment or order of

that court (*Id.*), unless words be added showing lunar month to be intended. As to the meaning of "calendar month" as applied to imprisonment, see *Migotti v. Colville*, 1879.

⁷ *Clementi v. Golding*, 1809, as to the meaning of the word "book"; *Com. v. Kneeland*, 1838 (*Am.*); *R. v. Woodward*, 1831. In the last case the judges unanimously held that they were bound to notice that *beans* were a species of *pulse*. So in *R. v. Swatkins*, 1831, *Patteson, J.*, after conferring with *Bosanquet, J.*, judicially noticed that *barley* was *corn*, in an indictment for arson under the Act just mentioned. In *R. v. Beaney*, 1820, however, the judges refused to notice that a *colt* was an animal of the *horse* species.

⁸ 43 & 44 *V. c. 9*, § 1; formerly local time prevailed, see *Curtis v. March*, 1858.

⁹ *Mouflet v. Cole*, 1872.

¹⁰ *Hockin v. Cooke*, 1791; *O'Donnell v. O'Donnell*, 1878 (*Ir.*); 41 & 42 *V. c. 49*.

¹¹ *Glossop v. Jacob*, 1815; *Kearney v. King*, 1819.

¹² *Bryant v. Foot*, 1848.

¹³ See *Read v. Bishop of Lincoln*, 1892, post, § 1785; *Bk. of Augusta v. Earle*, 1839 (*Am.*).

¹⁴ *Gr. Ev.* § 6, as to first seven lines, in great part.

Thus they judicially notice the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government;¹ and the local divisions of their country, such as states,² provinces,³ counties,⁴ counties of cities, cities,⁵ towns, parishes, and the like, so far as political government is concerned or affected; and when dealing with questions of navigation, the geographical positions and the names of places as shown on the Admiralty chart.⁶ But courts are not obliged to judicially notice mere local divisions, nor their precise limits (further than they may be described in public statutes⁷). Accordingly they have refused to notice judicially that "a part of the coast called Suffolk" was not in Kent; or that "Orfordness, in the county of Suffolk," was not situated between the North Foreland and Beachy Head;⁸ that a particular place is within a certain city;⁹ or that a particular town is within a certain diocese;¹⁰ or that a street mentioned in the pleadings is a public thoroughfare, though the word "street," *via strata*, would rather imply that it was;¹¹ or that a particular street is not in a certain county, though it be notorious that a street bearing the same name is in another county;¹² or that a city

¹ See "The Foreign Jurisdiction Act, 1890" (53 & 54 V. c. 37), legalizing acts done in dominions acquired by 6 & 7 V. c. 94, treaty, capitulation, grant, usage, sufferance, or other lawful means. One of Her Majesty's principal secretaries of state, in answer to question put by any court in the Queen's dominions, is required, within a reasonable time in that behalf, to cause proper and sufficient answers to be returned to all such questions, which answers shall, *upon production thereof, be final and conclusive evidence*, in the suit or other proceedings, of the several matters therein contained.

² *Whyte v. Rose*, 1842. There the court noticed, that by "the kingdom of Ireland" was meant that part of the United Kingdom called Ireland.

³ *Id.*

⁴ *Deybel's case*, 1821. In 2 Inst. 557, it is said "the King's courts" "take notice of all the counties of England." In *R. v. Isle of Ely*, 1850, the court judicially noticed that the Isle of Ely was a division of a county in the nature of a riding,

and, as such, *primâ facie* liable to repair bridges within it. In *Harris v. O'Loughlen*, 1871 (Ir.), the M. R. took judicial notice of the baronies in an Irish county, such baronies having been enumerated in 13 & 14 V. c. 68, Sch. A. (repealed by 54 & 55 V. c. 67).

⁵ *R. v. St. Maurice*, 1851.

⁶ *Birrell v. Dryer*, 1884.

⁷ *Deybel's case*, 1821; *Fazakerley v. Wiltshire*, 1720; *R. v. Burridge*, 1735; *Thorne v. Jackson*, 1846.

⁸ *Deybel's case*, 1821. In *Kirby v. Hickson*, 1850, the court refused to take judicial notice that Park Street, Grosvenor Square, in Middlesex, was within twenty miles of Russell Square, in the same county.

⁹ In *Brune v. Thompson*, 1842, where the plaintiff was nonsuited for not proving that the Tower of London was within the City of London.

¹⁰ *R. v. Simpson*, 1738.

¹¹ *Grant v. Moser*, 1843 (*Tindal, C.J.*).

¹² *Humphreys v. Budd*, 1841. See *Thorne v. Jackson*, 1846.

mentioned in a document is in a particular country, even though it appear that one with a similar name is the capital of such country.¹ They have, however, noticed that the Queen's Prison is situated in England.²

§ 18.³ The courts will, too, judicially recognise the political constitution or frame of their own government; its essential political agents or public officers sharing in its regular administration; and its essential and regular political operations and actions. Accordingly, all tribunals notice the accession and demise of the sovereign of their country;⁴ the heads of departments, and the principal officers of state, whether past or present;⁵ the marshals and sheriffs, but not the deputies of these functionaries;⁶ the existence of a war in which their country is engaged, at least when such war is recognised in public proclamations or Acts of Parliament;⁷ the days of special public fasts and thanksgivings, when recognised in like manner; the stated days of general political elections; the date and place of the sittings of the legislature;⁸ and, in short, "all public matters which affect the government of the country."⁹ And though they were not formerly so,¹⁰ the journals of either House of Parliament are now evidence, if they purport to be printed by the official printers.¹¹ But the courts will not recognise private orders made at the council-table;¹² nor, it seems, any orders of Council, even though they regard the Crown and the government.¹³

¹ *Kearney v. King*, 1819. There it was held that a declaration on a bill drawn and accepted at Dublin, to wit, at Westminster, for 542*l.*, must be taken to be on a bill drawn in England for English money, and that therefore proof of a bill drawn at Dublin in Ireland for Irish money, which is of less value, was a fatal variance.

² *Wickens v. Goatly*, 1851.

³ *Gr. Ev.* § 6, in part.

⁴ *Holman v. Burrow*, 1702; *R. v. Pringle*, 1840.

⁵ *R. v. Jones*, 1809; *Bennett v. The State of Tennessee*, 1826 (Am.); *Whaley v. Carlisle*, 1866 (Ir.) (where the court judicially noticed that Lord Hawkesbury had been foreign minister in 1803).

⁶ See *Grant v. Bagge*, 1802.

⁷ *Dolder v. Ld. Huntingfield*, 1805; *R. v. De Berenger*, 1814. When war is neither publicly proclaimed, nor noticed in any statute, its existence is solely a question for the jury: 1 Hale, 164; *Post. O. L. d. 1*, c. 2, § 12. The existence of war between foreign countries will not be judicially noticed: *Dolder v. Ld. Huntingfield*, 1805 (Ld. Eldon).

⁸ *R. v. Wilde*, 1669; *Birt v. Rothwell*, 1697.

⁹ *Taylor v. Barclay*, 1828.

¹⁰ *R. v. Knollys*, 1694.

¹¹ 8 & 9 V. c. 113, § 3, cited ante, § 7.

¹² 6 Vin. Abr. 490.

¹³ *Att.-Gen. v. Theakstone*, 1820. See post, §§ 1527, 1664.

§ 19. Lastly, each Division of the Supreme Court is bound to judicially notice its own rules and course of proceeding;¹ the rules and practice of the other Divisions;² and also the limits of their respective jurisdictions,³—as, for instance, that the Probate, Divorce, and Admiralty Division has so far jurisdiction over the personal estate of an intestate British subject, whether situated in Ireland, the colonies, or any foreign country, that it may grant letters to administer such property, and must do so before the administrator can sue in any English Court in respect thereof.⁴ All courts will further notice the privileges of their officers⁵ and solicitors,⁶ a term which now includes both “attorneys” and “proctors”;⁷ and also the fact that the assizes, though constituting for some purposes one legal day, may be continued from day to day with or without adjournment, and often occupy several natural days;⁸ the existence of courts of general jurisdiction;⁹ the powers of the Ecclesiastical Courts; and the jurisdiction of the Bankruptcy Courts,¹⁰ together with all general rules under that Act, whether made by the Lord Chancellor, with the concurrence of the President of the Board of Trade, for carrying into effect its objects,¹¹ or made by the Board of Trade, for regulating matters of an administrative character under it, if printed by the Queen’s printers, purporting to be issued under the authority of the Board.¹² Judicial notice must also be taken of the rules made under the Bankruptcy (Ireland) Amendment Act, 1872.¹³ Certain other rules made under statutory authority are likewise judicially noticed.¹⁴

¹ *Dobson v. Bell*, 1676; *Pugh v. Robinson*, 1786.

² *Lane’s case*, 1587; *Worlich v. Massey*, 1605; *Mounson v. Bourn*, 1648; *Reidy v. Pierce*, 1861 (*Ir.*) (*Pigot, C.B.*); *Caldwell v. Hunter*, 1848.

³ *Doe v. Caperton*, 1829. See *Spooner v. Juddow*, 1848.

⁴ See *Whyte v. Rose*, 1842.

⁵ *Ogle v. Norecliffe*, 1708.

⁶ *Stokes v. Mason*, 1808; *Chatland v. Thornley*, 1810; *Hunter v. Neck*, 1841; *Walford v. Fleetwood*, 1845.

⁷ *Jud. Act*, 1873 (36 & 37 V. c. 66), § 87.

⁸ *Whitaker v. Wisbey*, 1852.

⁹ *Tregany v. Fletcher*, 1696.

¹⁰ 46 & 47 V. c. 52, §§ 92 et seq.

¹¹ *Id.* § 127.

¹² *Bankruptcy Rules*, 1883, r. 257.

¹³ 35 & 36 V. c. 58, § 124, *Ir.*

¹⁴ The principal of these are rules made by the Board of Trade under “The Gas and Water Works Facilities Act, 1873” (36 & 37 V. c. 89), § 14; those made either by Order in Council, or by the Committee of Council, under “The Crown Office Act, 1877” (40 & 41 V. c. 41), §§ 3, 5; those made by the Lord Chancellor, under “The Summary Jurisdiction Act, 1879” (42 & 43 V. c. 49), § 29; those made by the Lord Chancellor with the assistance of the Registrar, under “The Land Transfer Act, 1875” (38 & 39 V. c. 87), § 111; those made under “The

§ 20. It is not clear whether or not the judges of the Supreme Court of Judicature are bound to notice who are the judges in inferior courts of record. The weight of American authorities is in favour of recognising them;¹ but the Court of Queen's Bench once refused to notice who was judge of the then Court of Review.² The Supreme Court will not, unless when called upon to review their judgments,³ take cognizance of the customs and proceedings in inferior courts of limited jurisdiction,⁴ except so far as they are regulated by statute.⁵

§ 21.⁶ Where matters ought to be judicially noticed, but the memory of the judge is at fault, he resorts to such means of reference as may be at hand, and he may deem worthy of confidence.⁷ Thus, if the point be a date, he may refer to an almanac;⁸ if it be the meaning of a word, to a dictionary;⁹ if it be the construction of a statute, to the printed copy; or, in case that appears to be incorrect, to the parliament roll.¹⁰ In some instances, the judge has refused to take cognizance of a fact, unless the party calling upon him to do so could produce at the trial some document by which his memory might be refreshed. Thus Lord Ellenborough¹¹ once declined to take judicial notice of the King's proclamation, the counsel not being prepared with a copy of the Gazette in which it was published; and in a case in which it became material to consider how far the prisoner owed obedience to his sergeant, and this depended on the articles of war, the judges thought that these ought to have been produced.¹² In other cases, the courts have themselves made the necessary inquiries, and that, too, without

Landlord and Tenant (Ireland) Act, 1870," either by the Court for Land Cases Reserved, or by the Privy Council in Ireland (33 & 34 V. c. 46, §§ 31, 41, Ir.); and those made by the Irish Land Commission (see 44 & 45 V. c. 49, § 50, subs. 2, Ir.).

¹ *Hawks v. Kennebec*, 1811 (Am.); *Ripley v. Warren*, 1824 (Am.); *Despau v. Swindler*, 1825 (Am.).

² *Van Sandau v. Turner*, 1845.

³ *Chitty v. Dendy*, 1835.

⁴ *R. v. U. of Cambridge*, 1736, where the court refused to notice that the University Court in Cambridge proceeded according to the rules of the civil law. See, also,

Lane's case, 1587; *Peacock v. Bell*, 1667; and *Dance v. Robson*, 1829.

⁵ As, e.g., the Court of the V.-Ch. of Oxford, now regulated by 17 & 18 V. c. 81 ("The Oxford University Act, 1854"), § 45.

⁶ Gr. Ev. § 6, as to first three lines.

⁷ Gresl. Ev. 295.

⁸ *Page v. Faucet*, 1591. See *Tutton v. Darke*, 1860.

⁹ *Clementi v. Golding*, 1809.

¹⁰ *R. v. Jeffries*, 1722; *Spring v. Eve*, 1677.

¹¹ In *Van Omeron v. Dowick*, 1809.

¹² *R. v. Withers*, undated (Buller, J.), cited in *R. v. Holt*, 1793 (Buller, J.).

strictly confining their researches to the time of the trial. Thus, where¹ the question was, whether the Federal Republic of Central America had been recognised by the British Government as an independent state, a Vice-Chancellor sought for information from the Foreign Office; in another case, the Court of Common Pleas directed inquiry to be made in the Court of Admiralty as to the maritime law;² and the same Court also once made inquiry as to the practice of the Inrolment Office in the Court of Chancery;³ while Lord Hardwicke⁴ asked an eminent conveyancer respecting the existence of a general rule of practice in the latter's profession.

¹ *Taylor v. Barclay*, 1828. See, 1620.
also, *The Charkieh*, 1878.

² *Chandler v. Grieves*, 1792.

³ *Doe v. Lloyd*, 1840, acting on
the authority of *Worsley v. Filisker*,

⁴ *Willoughby v. Willoughby*, 1787.

See, also, *Ex. S. C.* 1883, *Ord. LI.*
rr. 7, 8.

AMERICAN NOTES.

§ 4. **Judicial Notice.** — Certain facts a judge or jury will adopt as the basis of action without requiring the party to whose case they are essential to prove them by evidence. These facts, while having the common feature that a judge will not require them to be proved because he knows them already, are of two classes.

Some facts the judge is bound to take notice of or, in other words, know, at his peril. If he does not treat them as proved, in any case in which they are relevant, such conduct is error in law. The party aggrieved by a failure to recognise and adopt matters which the judge is bound judicially to know, may have the error corrected, upon proper proceedings, in a superior court, for all judges in the jurisdiction are equally bound to know them. Strictly speaking, it is not the duty of counsel to suggest them. It is the duty of the court to know them.

Another class of facts the judge is not, as before, bound to know, but as judges (and other men) usually know them he may fairly be assumed to know them. If a particular judge is not actually aware of any particular one of these facts, he may or he may not, as he sees fit, inform himself from any source, including the parties to the action. If he does not choose to inform himself, it is the duty of counsel to supply him with the needed information. If the court still declines to know such fact, it must be proved in the ordinary way or the party will lose the benefit of it, without redress in a superior court. Such facts are usually those of common knowledge.

The judge in any particular trial has a dual capacity. He is, in the first place, a part of the administration of government, established for the purpose of enforcing certain standards of conduct, reasoning and liability, rules of law or practice, which have been established by the sovereign power of the jurisdiction in which the court is sitting. In the second place, he is an intelligent member of the community in which he resides. As such, he knows what is generally known to others in the community. These facts, usually not disputed and capable of easy verification if disputed, may, as a rule, be safely assumed to be true unless and until disputed or disproved. In other words, there is in many cases no need for proving to a person of average intelligence what every one assumes to be true, unless the fact is disputed. As Lord Ellenborough said in *Peltier's Case* (28 State Trials, 616) (1803), speaking of an admission, that Napoleon Buonaparte was Chief Consul and France and England at peace on a certain date, "They were capable of easy proof if they had not been admitted. Their notoriety seems to render the actual proof very unnecessary."

The division into two classes of the facts which, as is said, need

not be proved, because judges already know them, follow with general correctness this division between the official and personal capacity of judges. In other words, matters of law or established by law are matters of required cognisance; matters of fact are the subject of optional cognisance. When it is said a judge takes judicial notice of the statute law of his state a somewhat different thing is meant than when it is said that he knows, without proof, the date of the battle of Lexington. The judge may really be equally ignorant on both these points. The statute in question may but just have been enacted and the actual knowledge of it confined to a few officials at the seat of legislation. The judge may never have read or heard the date of the battle. But the fact of the statute he must know at the peril of committing error. The other fact he may be assumed to know; but if he does not, he commits no error in law in refusing to assume its truth as part of a decision. The one refusal may be rectified in an appellate or superior court. The other will not.

For example, in a case where both the court and parties assumed the existence of a law which had been repealed, relief by a new trial was granted although the point was not taken at the trial. *Belmont v. Morrill*, 69 Me. 314 (1879).

INTERNATIONAL RELATIONS. — Among the facts established by law of which courts, as part of the administration of government, are bound to take judicial notice are the existence of other nations, their sovereignty and forms of government, and the seals and other usual emblems or indicia of such sovereignty or government. Courts take cognisance of the great seal of any nation recognised by the government under which the Court is acting, *e. g.* Portugal, *Church v. Hubbard*, 2 Cranch, 186 (1804); Denmark, *Griswold v. Pitcairn*, 2 Conn. 85 (1816); Lincoln *v. Battelle*, 6 Wend. 475 (1831).

Such a seal is said to "prove itself," *Watson v. Walker*, 23 N. H. 471, 496 (1851), speaking of the great seal of England.

The same rule applies in the courts of one state of the Union to the great seal of a sister state, *e. g.* of a copy of a Maryland statute authenticated by the great seal of Maryland when offered in a court in Pennsylvania, *U. S. v. Johns*, 4 Dall. 412 (1806); so in New York of a Michigan record, *Coit v. Millikin*, 1 Denio, 376 (1845), and in Maine of a Massachusetts record, *Robinson v. Gilman*, 20 Me. 299 (1841). It was held in *Coit v. Millikin* that the seal required must be one good at common law, "an impression upon wax, wafer, or some other tenacious substance," and that, in the absence of an enabling statute, "an impression upon paper alone (as in that case) is not a seal."

But see *Pierce v. Indseth*, 106 U. S. 546 (1882) *contra*.

The seal of the United States government will be recognised in a state court. *Yount v. Howell*, 14 Cal. 465 (1859); and the seal of

a state in the courts of the United States, *U. S. v. Amedy*, 11 Wheat. 392 (1826).

The seal of a district court of the United States proves itself either in a state or federal court, and the records of such court need not be proved in any other way than under the seal of the court as affixed by the clerk. The rule is thus clearly and succinctly stated: — “Circuit and district courts of the United States certainly cannot be considered foreign in any sense of the term, either in respect to the state courts in which they sit, or as respects the circuit or district court of another circuit or district. On the contrary, they are domestic tribunals, whose proceedings all other courts of the country are bound to respect, when authenticated by the certificate of the clerk under the seal of the court, the rule being that the circuit court of one circuit or the district court of one district is presumed to know the seal of the circuit or district court of another circuit or district, in the same manner as each court within a state is presumed to know and recognise the seal of any other court within the same state.” *Turnbull v. Payson*, 95 U. S. 418 (1877); *Womack v. Dearman*, 7 Porter, 513 (1838). “It will not be denied that the constitution of the United States and the laws of congress passed in pursuance thereof, will be judicially recognised by the courts of this state. The several courts of the United States are called into existence by act of congress under the constitution, and their powers and duties specifically defined by statute; such courts, therefore, together with their seals, will also be judicially recognised.” *Adams v. Way*, 33 Conn. 419 (1866).

The great seal of the Province of Upper Canada of itself imports verity. *Lazier v. Westcott*, 26 N. Y. 146 (1862).

So the courts of a nation will so far take cognisance of the sovereignty of insurgents recognised as belligerents by the executive or legislative branches of the government as to decline to inquire into the title or commission of their public vessels. *Santissima Trinidad*, 7 Wheat. 283, 335 (1822).

In a case where the condemnation of a vessel for a fraud on the revenue laws of St. Domingo during the French occupancy of the island was a fact in issue, the attestation of the proper British authorities who had subsequently conquered and then held the island, was deemed sufficient, though “certified only under the governor’s seal at arms, instead of a colonial or public seal.” *Hadfield v. Jameson*, 2 Munf. (Va.), 53, 70 (1809).

Probably this knowledge on the part of judges of the international relations of the government under which they act is, historically, a survival of the ideas of the time when judges sat as the direct representatives of the king; and might therefore be required to know what the king himself knew in other branches of his sovereignty, *e. g.* his relation to other nations.

So the limits of the nation is rather a political than a legal question, the action of the executive controlling that of the courts, who will support the action of the co-ordinate branch of the government. *Foster v. Neilson*, 1 Peters, 253 (1829).

It is, therefore, for the executive or legislative branch of government to take the initiative in these international matters. Courts will decline knowledge of the existence of sovereignties not yet recognised by the executive and legislature. The rule is that "where the political authorities of the State have actually claimed and exercised jurisdiction over particular localities . . . the courts are thereby concluded, and have only to declare the fact and govern themselves accordingly, without undertaking to pass on the validity of such claim." *State v. Wagner*, 61 Me. 178 (1873). "The seal of such unacknowledged government cannot be permitted to prove itself; but it may be proved by such testimony as the nature of the case admits." *U. S. v. Palmer*, 3 Wheat. 610, 634 (1818).

PUBLIC LAWS. — It being their first and distinctive duty, as part of the government, to enforce certain established rules of law and general standards of conduct, courts are required to know, without proof, the laws and standards they are constituted to enforce. Speaking generally, and disregarding private statutes and acts of local application, courts take judicial cognizance of the existence and scope of all legal rules to which they are commissioned by the sovereign of their country to compel obedience.

LAW OF NATIONS. — The law of nations being part of the public law of each jurisdiction receives judicial notice.

So of the rules of navigation adopted by commercial nations. *The Scotia*, 14 Wall. 171 (1871). As the court in that case say: "Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations." For the same reason, what is part of the general law merchant "is matter of law for the court," — *i. e.* will be judicially noticed. *Jewell v. Center*, 25 Ala. 498, 505 (1854). For "the principles of the law merchant . . . have become a part of the common law." *Munn v. Burch*, 25 Ill. 35, 38 (1860). Or, as the court in a New Jersey case (*Reed v. Wilson*, 41 N. J. Law, 29 (1879) say, in taking judicial notice that a note payable on a certain day was properly protested on the day previous: "The court must take judicial notice not only of the law merchant, which is a part of the common law, but also of the almanac, from which it appears that the 15th day of December, 1872, fell on Sunday." To same effect, *Sasscer v. Farmers' Bank*, 4 Md. 409 (1853) holds that Sundays and great festivals such as Christmas are *dies non juridici* in commercial usage.

It has, however, been held that while the general maritime law is the basis of the law of the United States, it is, having no inherent force of its own, only so far operative in any country as it has been

adopted by the laws and usages of the country. *The Lottawanna*, 21 Wall. 558, 573 (1874); *The Scotland*, 105 U. S. 24 (1881).

As courts of admiralty are tribunals recognised by the law of nations, their seals need not be proved. *Thompson v. Stewart*, 3 Conn. 171, 181 (1819); *Yeaton v. Fry*, 5 Cranch, 335 (1809). So of the general customs of trade. "We cannot close our eyes," say the supreme court of the United States, "to the well known course of business in the country." *Bank of Kentucky v. Adams Express Co.* 93 U. S. 185 (1876); *Wiggins Ferry Co. v. C. & A. R. Co.*, 5 Mo. App. 347, 375 (1878). But the custom, to be noticed without proof, must be one of the commercial world. A commercial custom adopted by local authority, *e. g.* a broker's board, must be proved. "The court will not take judicial cognisance of those rules, unless they are rules or usages of trade and commerce, which would be recognised without their adoption by any particular board or association." *Goldsmith v. Sawyer*, 46 Cal. 209 (1873).

The New York courts place "the general course of business in a community, including the universal practice of banks" in the second class; *i. e.* among matters of optional cognisance "of which courts may take judicial notice." *Merchants Bank v. Hall*, 83 N. Y. 338 (1881); *Yerkes v. National Bank*, 69 N. Y. 382 (1877); *Hunter v. N. Y. &c. R. R.*, 116 N. Y. 615 (1889).

Where the indicia of title to certain goods to be forwarded were assigned to a merchant to secure his advances, the court say that it is "the usual course of the great inland commerce" for agricultural produce between the Mississippi Valley and markets. "It has existed long enough to assume a regular form of dealing and it embraces such a wide extent of territory and is of such general importance, that its ordinary course and usages are now publicly recognised and understood; and it is the duty of the court to recognise them, as it judicially recognises the general and established usages of trade on the ocean." *Gibson v. Stevens*, 8 How. 384, 399 (1850).

Of a custom for merchants to exchange mutual credits, the supreme court of Michigan say: — "We must take judicial notice of a custom which is familiar everywhere." *Cameron v. Blackman*, 39 Mich. 108 (1878).

The powers of a notary public, being an officer recognised by the law merchant in the protest of foreign bills of exchange, will be noticed by the court and his "seal proves itself in all countries where the law merchant prevails, and it is only necessary that it should conform to the law of the place where the notary acts." *Orr v. Lacey*, 4 McLean, 243 (1847). "The court will take judicial notice of the seals of notaries public, for they are officers recognised by the commercial law of the world." *Pierce v. Indseth*, 106 U. S. 546 (1882); *Delafield v. Hand*, 3 Johns. 310, 314 (1808).

See also *Brown v. Phila. Bank*, 6 S. & R. 484 (1821).

The recognition does not extend to the power to attest deeds. *Nye v. McDonald*, 2 Low. Can. Jurist, 109 (1857). *Neese v. Farmers Ins. Co.*, 55 Ia. 604 (1881).

But the courts will not recognise without proof the right of other officers empowered by local laws to protest negotiable instruments, *e. g.* a *huissier* in France. *Chanoine v. Fowler*, 3 Wend. 177, 178 (1829). So of the certificate of a consul. *Church v. Hubbart*, 2 Cranch, 186 (1804).

In certain cases a notarial seal has been considered a sufficient certification of the proceedings of a foreign court. *Yeaton v. Fry*, 5 Cranch, 335 (1809); *Fellows v. Menasha*, 11 Wisc. 558 (1860).

While a notarial protest of a promissory note is not, strictly speaking, an official act, such protest duly authenticated by his signature and seal is competent secondary evidence, after his decease, of the facts stated in the protest, "because it is in the usual course of their duty and business to keep such memoranda." *Porter v. Judson*, 1 Gray, 175 (1854).

The seal may be made directly on the paper without wax or other adhesive substance. *Pierce v. Indseth*, 106 U. S. 546 (1882).

This judicial knowledge of the law merchant cannot be so far extended as to embrace local customs. The local customs of miners as to location of claims must be proved by competent evidence. *Sullivan v. Hense*, 2 Col. 424 (1874); *Pougade v. Ryan*, 21 Nev. 449 (1893). The usages and customs of Indian tribes "must be regarded as facts, and must be averred and proved like any other material facts." *Turner v. Fish*, 28 Miss. 306 (1854). Courts will require proof of local rights in water for irrigation purposes even when such rights have been recognised by statute. *Lewis v. McClure*, 8 Oreg. 273 (1880). But see *Amer. Nat. Bk. v. Bushey*, 45 Mich. 135, 140 (1881) that the customers of a bank will be assumed to know the "ordinary rules and necessities of business."

FEDERAL LAWS.—The constitution of the United States being the supreme law of the land, all courts, state and national, take notice without proof of certain public acts done in the exercise of the powers conferred by that instrument.

CONSTITUTION OF THE FEDERAL GOVERNMENT.—Courts are required to take notice of the office of president of the United States, its incumbent and his signature.

So in speaking of a United States patent to lands, the supreme court of California say: "The patent proves itself and requires no authentication other than the signature of the president and the seal of the government. The court takes judicial notice of both signature and seal." *Yount v. Howell*, 14 Cal. 465 (1859).

Where a patent was signed by an acting commissioner of patents, it was held unnecessary to aver or prove that he was legally entitled

to act in that capacity. "The court will take notice judicially of the persons who from time to time preside over the patent office, whether permanently or transiently, and the production of their commission is not necessary to support their official acts." *York &c. R. Co. v. Winans*, 17 How. 30 (1854).

"State courts are bound to take judicial notice of the existence of the federal courts." *Mims v. Swartz*, 37 Tex. 13 (1872); *Headman v. Rose*, 63 Ga. 458 (1879). "We all know that the circuit courts of the several states are courts of general jurisdiction, as well as we know that courts of justice of the peace are not; and why should judges assume a degree of ignorance on the bench which would be unpardonable in them when off of it?" *Jarvis v. Robinson*, 21 Wisc. 523 (1867).

So of the existence and powers of the president of the United States. The proclamation of the president of the United States is "a public act of which all courts of the United States are bound to take notice and to which all courts are bound to give effect." *Armstrong v. U. S.*, 13 Wall. 154 (1871). So of the departments of state, and public acts in pursuance of their legal powers, *e. g.* the instructions of the navy department to the naval commanders of the United States. *The Peterhoff*, Blatch. Pr. Cases, 463, 506 (1863).

But courts "are not bound to take official notice of the rules adopted for the regulation of the different departments of the federal government or those established by the board of land commissioners or surveyor general of the United States for California." *Hensley v. Tarpey*, 7 Cal. 288 (1857). Otherwise of the action of the federal land office when regulated by statute. *Bigelow v. Chatterton*, 51 Fed. Rep. 614 (1892).

As treaties properly executed under constitutional prerogative are part of the law of each jurisdiction in the United States, all courts take judicial notice of them. Thus, in an action of slander charging a murder in Ireland judicial notice will be taken that under the "Ashburton treaty" between Great Britain and the United States, murder is an extraditable offence in this country. *Montgomery v. Deeley*, 3 Wisc. 709 (1854). The effect of the treaty of Paris, ceding Louisiana to the United States, is judicially noticed in relation to the land titles of that state. *U. S. v. Reynier*, 9 How. 127 (1850). The rule includes treaties between the United States and Indian nations. *Carson v. Smith*, 5 Minn. 78 (1860); *U. S. v. Beebe*, 2 Dak. 292 (1880); *Lewis v. Harris*, 31 Ala. 689 (1858). But where a treaty confers authority upon certain persons to do certain acts, courts, while recognising the existence of the authority without proof, will require proof of the manner in which the authority was, in point of fact, exercised. Thus, where a right to select a certain amount of land was conferred by a treaty with the Chip-

pewa Indians, proof was required of the manner in which the right was exercised, when that fact was material. *Dole v. Wilson*, 16 Minn. 525 (1871). The public acts of congress, for similar reasons, are within the judicial knowledge of all courts, state and national. *Cox v. Morrow*, 14 Ark. 603 (1854).

For example, judicial notice is taken of the national bankruptcy law. *Morris v. Davidson*, 49 Ga. 361 (1873); *Mims v. Swartz*, 37 Tex. 13 (1872). Even if such public act of congress relates to the District of Columbia, *Bayly's Adm. v. Chubb*, 16 Gratt. 284 (1862); or concerns exclusively the municipal affairs of the District of Columbia. *Chesapeake Ohio Canal Co. v. Baltimore & Ohio Railroad Company*, 4 Gill & J. 1, 63 (1832). Therefore where the laws of Maryland were by act of congress continued in the District of Columbia, the courts of Virginia take judicial notice of these laws. *Bird's Case*, 21 Gratt. 800 (1871). So of the acts of congress relating to the "disposition of the public lands, and the kind of evidence furnished to a purchaser and the system of surveys adopted for those lands by congress." *Gooding v. Morgan*, 70 Ill. 275 (1873); *Semple v. Hagar*, 27 Cal. 163 (1865); *Papin v. Ryan*, 32 Mo. 21 (1862); *Wright v. Hawkins*, 28 Tex. 452 (1866). So it is the duty of the state courts to take cognisance of the United States internal revenue laws and dismiss an action invalidated by such laws, though the point is not relied on by the parties but is taken by the court *suâ sponte*. *Kessel v. Albetis*, 56 Barb. 362 (1870). Where congress has conferred upon a department the power to prescribe rules and regulations, courts will take judicial cognisance of the latter. *Caha v. U. S.*, 152 U. S. 211 (1893).

Following analogous decisions, it is held that where the substance of the statutes of another state are incorporated in a public act of congress, state courts will take judicial notice of such statutes. *Flanegin v. Washington Ins. Co.*, 7 Pa. St. 306 (1847).

DOMESTIC PUBLIC LAWS. — Courts not only recognise, without proof, the existence of treaties and congressional laws which they are required to enforce; they also recognise all public laws passed by the appropriate branch of any state government under which the court is organised. *State v. Jarrett*, 17 Md. 309 (1861); *Girdlestone v. O'Reilly*, 21 Q. B. U. C. 409 (1862); *Inhabitants of Springfield v. Worcester*, 2 Cush. 52 (1848); *U. S. v. Fuller*, 4 N. M. 358 (1889); *Division of Howard Co.*, 15 Kans. 194 (1875); *Griswold v. Gallup*, 22 Conn. 208 (1852); *Parent v. Walmsly's Adm.*, 20 Ind. 82 (1863); *Evans, Auditor, v. Brown*, 30 Ind. 514 (1869); *Dolph v. Barney*, 5 Oreg. 191 (1874); "and where one state recognises acts done in pursuance of the laws of another state, its courts will take judicial cognisance of those laws, so far as may be necessary to determine the validity of the acts alleged to be done in conformity with them." *Carpenter v. Dexter*, 8 Wall. 513, 531 (1869).

When the courts of one state have taken judicial cognisance of the laws of another they will "until it is proved that the law has been changed . . . presume it still exists." *Graham v. Williams*, 21 La. Ann. 594 (1869).

The courts of Canada take judicial cognisance of the acts of the Provincial legislature even though locally limited. *Darling v. Hitchcock*, 25 Q. B. U. C. 463 (1866); and Canadian Admiralty Courts are "bound to take judicial notice of an order in council from which the court derives its jurisdiction." *Reg. v. The Minnie*, 4 Can. Exch. 151 (1894).

The rule requires judicial knowledge of such public laws of any state or country of which the jurisdiction formed part as were in use while the union continued. *Cox v. Morrow*, 14 Ark. 603 (1854); *Arayo v. Currell*, 1 La. Rep. 528, 541 (1830); *Stokes v. Macken*, 62 Barb. 145 (1861); *Henthorne v. Doe*, 1 Blackf. 157 (1821); *Delano v. Jopling*, 1 Litt. 417 (1822); *U. S. v. Ritchie*, 17 How. 525 (1854); *Otto v. Soulard*, 9 Mo. 573 (1845); *Doe v. Eslava*, 11 Ala. 1028 (1847).

It is on the same principle that American courts take cognisance of the common and statutory laws of England in force at the time of the Revolution, — so far as suitable to the new conditions. *Ocean Ins. Co. v. Fields*, 2 Story, 59, 75 (1841).

So the courts of a territory are required to know the public laws of the territory, and if the going into effect of such a law is dependent on lapse of time or other condition, must notice the condition and its being complied with at any particular time. *Hoyt v. Russell*, 117 U. S. 401 (1885). The federal courts, for the same reasons, take judicial cognisance of the public acts of congress.

E. g. The National Bankruptcy Act. *Lathrop v. Stuart*, 5 McLean, 167 (1850).

So courts will notice repealing laws equally with other laws. *State v. O'Connor*, 13 La. Ann. 486 (1858).

So of the amendments to the constitution, *Graves v. Keaton*, 3 Cold. (Tenn.) 8 (1866).

In general, the laws of a sister state must be proved as facts; see post p. 52¹⁰. *Hanley v. Donaghue*, 116 U. S. 1 (1885).

It is usually not difficult to recognise a public act. As a rule it applies to all parts of a state.

But this is not essential. "It is a public act if it extends to all persons within the territorial limits described in the statute." *Levy v. State*, 6 Ind. 281 (1855). An act for the survey of a tract of land is special. *Allegheny v. Wilson*, 25 Pa. St., 332 (1855). But see *Duren v. Houston &c. R. Co.*, 86 Tex. 287 (1893). The court will not take judicial notice of the stages of the passage of a public act, as set out in the legislative journals. The journals must be offered. But, like other public documents, "they prove their own

authenticity." *Grob v. Cushman*, 45 Ill. 419 (1867); *Stall v. Druny*, 118 Ind. 449 (1888); *Chesapeake &c. Canal Co. v. Baltimore &c. R. R. Co.*, 4 Gill & J. 1, 63 (1832).

But whether a statute "be a law or not a law, is a judicial question, to be settled and determined by the courts and judges. . . . When once it became the settled construction of the Constitution of Illinois that no act can be deemed a valid law, unless, by the journals of the legislature, it appears to have been regularly passed by both houses, it became the duty of the courts to take judicial notice of the journal entries in that regard." *Town of South Ottawa v. Perkins*, 94 U. S. 260 (1876). Courts may examine the original roll in Secretary's office and any other sources of information. *Bowen v. Mo. Pac. R. R.*, 118 Mo. 541 (1893); *Moog v. Randolph*, 77 Ala. 597 (1884).

To determine the existence of a statute or when it went into effect judges "have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question, always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." *Gardner v. Collector*, 6 Wall. 499 (1867); *Somers v. State* (So. Dak.), 58 N. W. 804 (1894); *State v. Bailey*, 16 Ind. 46 (1861); *Pierson v. Baird*, 2 Greene (Ia.), 235 (1849); *Berliner v. Waterloo*, 14 Wisc. 378 (1861).

Certain laws applying only to a limited portion of the state are considered public because they apply to all citizens of the state. For example, in a Massachusetts case, *Parsons, C. J.*, speaking of an act for the preservation of bass in a certain river in the present state of Maine, says, "We are of opinion that the statute referred to is a public statute. It is obligatory on all the citizens, and they must notice it at their peril. We must, therefore, *ex officio*, take notice of it. Indeed, all the laws regulating the taking of fish are made for the public benefit, to preserve the fish, and are public statutes." *Burnham v. Webster*, 5 Mass. 266 (1809); so where an act forbidding any but specified persons from surveying or marking lumber in a certain county in Maine, and all persons from buying or selling lumber not so marked, was attacked as unconstitutional, the court say: "It is true that public acts are usually general in their character and operation, and equally applicable to all parts of the state. There are other acts which are considered as public acts, of which all persons are bound to take notice upon their peril, and yet they are local, because the violation of them is and must be local. . . . Nothing appears which indicates that the law was not intended as a public benefit, of which all the citizens of the state, as well as others, might equally participate." *Pierce v. Kimball*, 9 Greenl. 54 (1832). So an act authorising riparian proprietors of a section of Maryland to extend their ownership by

improvements into public waters "operating as a grant of the public domain, and affecting the rights of navigation and fishery, by allowing improvements to be made out into navigable water," was said to be entitled to be "judicially noticed by the court as a public law." *Hammond's Lessees v. Inloes*, 4 Maryland, 138, 172, (1853). On a criminal charge of selling "one pint of whiskey for 5 cents, not for mechanical or medicinal purposes," in violation of a statute applying to three towns in a certain county, forbidding sales of so small a quantity, except for these purposes, the defendant objected that the statute was not set out in the complaint. In overruling the objection, the court say, "Although local, it is not a private statute. To constitute a statute a public act, it is not necessary that it should extend to all parts of the state. It is a public act if it extend equally to all persons within the territorial limits described in the statute. The court was bound to notice that statute without pleading." *Levy v. State*, 6 Ind. 281 (1855). The same rule is applied where a general "Local option" law is passed, and the operation of the statute is dependent on an election. *State v. Cooper*, 101 N. C. 684 (1888).

"There are statutes that are local in one sense which are nevertheless public statutes; for it is not necessary to constitute a statute a public act that it should be equally applicable to all parts of the state. It is sufficient if it extend to all persons doing or omitting to do an act within the territorial limits described in the statute." *Bretz v. Mayor &c. of New York*, 6 Robertson, 325 (1868), a case holding that a statute conferring on the supreme court jurisdiction of actions against the corporation of New York city, was a public statute. So a statute creating a public office is a public statute. *State v. Jarrett*, 17 Md. 309 (1861). So a joint resolution imposing a duty on a public officer is a public statute and will be judicially recognised. *State v. Delesdenier*, 7 Tex. 76 (1851). The courts of Lower Canada take notice of acts published in the official gazette. *Dubois v. Fanteaux*, 7 Rev. Leg. 430 (1875).

A statute changing the name of a township "is a public local one, of which the court takes notice." *State v. Cooper*, 101 N. C. 684 (1888).

MUNICIPAL CORPORATIONS. — The case last cited is an illustration of the general rule that, as municipal corporations are not so much local legal entities with certain powers as they are instrumentalities for carrying on the functions of government, legislative acts creating, enlarging, or otherwise modifying such local municipalities and defining their powers, though necessarily of limited territorial application, are public acts of which the courts take judicial notice. *Albrittin v. Huntsville*, 60 Ala. 486 (1877); *Macey v. Titcombe*, 19 Ind. 135 (1862); *Stier v. Oskaloosa*, 41 Ia. 353 (1875); *Prell v. McDonald*, 7 Kans. 426, 445 (1871); *State v. Murfreesboro*, 11

Humph. (Tenn.) 217 (1850); *Gallagher v. State*, 10 Tex. App. 469 (1881); *Alexander v. Milwaukee*, 16 Wisc. 247 (1862); *Fauntleroy v. Hannibal*, 1 Dill. (U. S.) 118 (1871); *People v. Potter*, 35 Cal. 110 (1868); *Jones v. Lake View*, 151 Ill. 663 (1894); *Briggs v. Whipple*, 7 Vt. 15, 19 (1835); *Bituminous &c. Co. v. Fulton*, 33 Pac. Rep. (Cal.) 1117 (1893). For this reason the charter of a village corporation is a public law. *Village of Winooski v. Gokey*, 49 Vt. 282 (1877).

As in analogous cases, a special statute of village incorporation which is declared in the act itself to be a public statute will be noticed without proof. *Gormley v. Day*, 114 Ill. 185 (1885).

The rule applies to prior acts of incorporation since superseded. *Swain v. Comstock*, 18 Wisc. 463 (1864); by the same or a former government. *Payne v. Treadwell*, 16 Cal. 220, 231 (1860).

As the court say in *Prell v. McDonald*, (7 Kans. 426 (1871)): "In chartering such corporations the state in one sense charters a portion of itself. Such corporations are simply instruments in the hands of the state, made use of for the better protection of rights, the administration of justice, and the enforcement of the laws."

This judicial knowledge extends to similar acts of a former government of the state. "San Francisco having been constituted, by a public political act of the former government, a pueblo, we must take judicial notice of its existence, powers, and rights." *Payne v. Treadwell*, 16 Cal. 220, 231 (1860). The case is different only by being stronger where municipalities, *e. g.*, towns, are created under a general law, "conferring uniform and general powers on each." *Aldermen and Council v. Finley*, 10 Ark. 423 (1850); *Briggs v. Whipple*, 7 Vt. 15 (1835). Courts take judicial notice of such incorporating statutes as being public statutes. "But the fact that a particular village or town has availed itself of the provisions of these statutes, and became incorporated as they authorise, is private in its character, and we know of no principle of law which would require or authorise the courts to take judicial notice of it." *Hard v. City of Decorah*, 43 Ia. 313 (1876); *Rousey v. Wood*, 47 Mo. App. 465 (1891).

RAILROADS. — The existence of a general railroad law stands on the same footing as any other public law and is noticed as such. *Heaston v. Cincinnati, &c. R. R.*, 16 Ind. 275 (1861).

But statutes incorporating particular railroads have been held to be private. They are said (*Ohio R. Co. v. Ridge*, 5 Black. 78 (1839)) to "operate upon particular persons and private concerns." *Atchison, &c. R. R. v. Blackshire*, 10 Kans. 477, 487 (1872); *Perry v. New Orleans, &c. Railroad Co.*, 55 Ala. 413, 426 (1876). But see *Hall v. Brown*, 58 N. H. 93 (1877); *Caldwell v. Richmond R. R.*, 89 Ga. 550 (1892), *contra*.

In *Wright v. Hawkins*, 28 Tex. 452 (1866), it was held that a

land grant or reserve to aid the construction of a railroad is a public act, though printed among the private laws.

"In the case of public corporations created by public laws, the court is officially to take notice of the corporate character." *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420 (1860).

So of other public corporations. *E. g.*, the existence of the state bank of Arkansas need not be proved in the courts of that state. *McKiel v. Real Estate Bank*, 4 Ark. 592 (1841). So of the Bank of Tennessee. *Shaw v. State*, 3 Sneed (Tenn.), 86 (1855).

The courts will recognise bank charters as public acts of which they are obliged to take judicial notice. *Davis v. Bank of Fulton*, 31 Ga. 69 (1860); *Bank of Newberry*, 9 Rich. (S. C.) 495 (1855); *Hays v. Northwestern Bank of Virginia*, 9 Gratt. 127 (1852).

And acts in amendment thereof. *Jemison v. Planters and Merchants Bank*, 17 Ala. 754 (1850).

The rule extends to a case where an insurance company was by statute made a bank of discount and deposit. *Gordon v. Montgomery*, 19 Ind. 110 (1862).

STATUTORY MODIFICATIONS. — Courts may be required by statute to take judicial cognisance of private laws. *Bixler's Adm. v. Parker*, 3 Bush, 166 (1867).

Speaking of such a private law, the Virginia court of appeals say: "The judicial notice we are to take of it, is the same with that which we give to laws of a general and public nature." *Somerville v. Wimbish*, 7 Gratt. 205 (1850).

Where a public statute requires cognisance of particular facts, *e.g.* the result of local option (liquor) elections, such cognisance will be taken, "and since no sources of information are pointed out, it is incumbent on this as well as all other courts to inform itself by recourse to any and all sources of information." *Puckett v. State*, 71 Miss. 192 (1893); *Thomas v. Com.*, 90 Va. 92 (1893). But see also *Whitman v. State*, 80 Md. 410 (1894).

So if a statute incorporating a private corporation declares itself to be a public statute, the courts will take judicial cognisance of it. *Beaty v. Lessee of Knowles*, 4 Peters, 152 (1830).

So where the statute does not require that private acts should be specially pleaded. *Halbert v. Skyles*, 1 A. K. Marsh, (Ky.) 368 (1818); *Hart v. Balt. & O. R. R.*, 6 W. Va. 336 (1873).

Where a private statute is recognised and amended by an act declared to be public, courts will take judicial notice of the original statute. *Lavalle v. People*, 6 Ill. Ap. 157 (1880). So an addition to a public act is itself public. *Belmont v. Morrill*, 69 Me. 314 (1879). The repeal of a public law is itself public. *State v. O'Conner*, 13 La. Ann. 487 (1858).

Where particular facts are established by public statutes, the court of course take notice of such facts; *e. g.*, the character of

certain buildings as public houses under the gaming laws. *Grant v. State*, 27 S. W. 127 (Tex. 1894).

So of the establishment of a probate court in a certain county. *La Salle Co. v. Milligan*, 143 Ill. 321 (1892).

The courts of Canada take cognisance of facts published in the official gazette. *Simms v. Quebec, &c. R. R.*, 22 Low. Can. Jur. 20 (1877).

It follows from what has been said that, except in these instances of legal requirement, courts do not take judicial notice of private statutes. *Leland v. Wilkinson*, 6 Peters, 317 (1832). So of the incorporation of private corporations. *Workingmen's Bank v. Converse*, 33 La. Ann. 963 (1881); *Broad Street Hotel Co. v. Weaver's Adm.* 57 Ala. 26 (1876); *Danville &c. Plank-Road Co. v. State*, 16 Ind. 456 (1861); *Perdicaris v. Trenton City Bridge Co.*, 29 N. J. Law, 367 (1862).

In cases where the statute incorporating a bank or other institution declares itself to be a public act, that fact alone is sufficient to require the courts of the same jurisdiction to take judicial notice of it. *Buell v. Warner*, 33 Vt. 570 (1861).

So of a railroad. *Cincinnati, &c. R. R. v. Clifford*, 113 Ind. 460, 467 (1887); *Hammett v. Little Rock, &c. R. R. Co.*, 20 Ark. 204 (1859); *Western &c. R. R. v. Roberson*, 61 Fed. Rep. 592 (1894).

Or a statute may require courts to take judicial notice of village organisations as public acts. *Doyle v. Village of Bradford*, 90 Ill. 416 (1878). Or of the incorporation of proprietors of lands. *Beaty v. Lessee of Knowler*, 4 Pet. 152 (1830).

In other cases where a statute requires courts to take judicial notice of an otherwise private statute it will be the court's duty to take such notice. *Eel River Draining Association v. Topp*, 16 Ind. 242 (1861).

So courts take judicial notice of all statutes except those which declare themselves to be private if such is the requirement of the state constitution. *Covington Drawbridge Co. v. Shepherd*, 20 How. 227 (1857).

Courts do not take cognisance of other private statutes. *City of Allegheny v. Nelson*, 25 Pa. St. 332 (1855). For example, the incorporation of a turnpike by a special act. *Aliter* of a corporation under a general law. *Danville, &c. Plank Rd. v. State*, 16 Ind. 456 (1861).

So the superior judiciary of a state will not take cognisance of city, town, or county ordinances, or by-laws. *Furman v. Mayor, &c. of Huntsville*, 54 Ala. 263 (1875); *Hassard v. Municipality No. 2*, 7 La. Ann. 495 (1852); *State v. Oddle*, 42 Mo. 210 (1868); *City of McPherson v. Nichols*, 48 Kans. 430 (1892). *Garvin v. Wells*, 8 Ia. 286 (1859); *Lucker v. Com.*, 4 Bush (Ky.) 440 (1868); *City of Winona v. Burke*, 23 Minn. 254 (1876); *Mooney v. Kennett*, 19 Mo.

551 (1854); *Shanfelter v. Baltimore*, 80 Md. 483 (1894); *City of St. Louis v. Roche* (Mo.), 31 S. W. 915 (1895); *Porter v. Waring*, 69 N. Y. 250 (1877). So of the regulations of a canal board. *Palmer v. Aldridge*, 16 Barb. 130 (1852).

But it is within the reasoning by which courts take judicial cognisance of laws which they are constituted to enforce that the same municipal ordinances which must be proved before a superior court of judicature are recognised without proof by the courts of the body which passed the ordinance. *State v. City of Dubuque*, 11 Ia. 407 (1860).

So though the court will take judicial cognisance of the charter of a municipality and of its power to make by-laws, the existence of any particular by-laws so made must be alleged and proved. *Case v. Mayor of Mobile*, 30 Ala. 538 (1857); *Sherrel v. Murray*, 49 Mo. App. 233 (1892). So where, by statute, a county board was authorised to prescribe by order entered on its records such animals as could legally run at large, if such orders exist that fact must be alleged and proved. In the absence of such allegation and proof, cases will be determined by the general rules of law, unaffected by the statute. *Indianapolis &c. R. Co. v. Caldwell*, 9 Ind. 397 (1857). The reason of the rule is partly given in *Porter v. Waring*, 69 N. Y. 250 (1877), where the court say that a contrary rule "would open the door in many cases to mere conjecture, and involve an inquiry as to local enactments; the time when they took effect; the priority of the same, and their application to the case in litigation; which it would be difficult to dispose of without proof and which are not properly included within the ordinary scope of judicial knowledge in the determination and trial of cases."

Of course, the court, *ex gratia*, may look up the ordinance for itself, as was done in *Hassard v. Municipality No. 2*, 7 La. Ann. 495 (1852); and it has been held that where an inferior court is required to take cognisance of local statutes, the appellate court should do the same, on hearing of the appeal. *Solomon v. Hughes*, 24 Kans. 211 (1880).

The statutory permission to prove a by-law, ordinance, &c., by a printed copy properly authenticated does not affect the rule. *City of Winona v. Burke*, 23 Minn. 254 (1876).

JUDICIAL COGNISANCE OF STATE LAW BY FEDERAL COURTS.—Not only do state courts take notice of the laws of the United States but the federal courts take cognisance of state laws. Thus, the circuit courts of the United States take judicial cognisance of the public laws of any state of the Union, when relevant to the issue, though such state is not within its immediate jurisdiction. The reason is stated by Story, J., in *Owings v. Hull* (9 Peters, 607, 624 (1835)) where it was held that the circuit court of the United States for Maryland was bound to take judicial cognisance of the

laws of Louisiana as to the possession of a notarial instrument executed in New Orleans. "The circuit courts of the United States are created by congress, not for the purpose of administering the local law of a single state alone, but to administer the laws of all the states in the Union, in cases in which they respectively apply. The judicial power conferred on the general government by the constitution extends to many cases arising under the laws of the different states. . . . That jurisprudence is then, in no just sense, a foreign jurisprudence, to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established, but it is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts." See also *Elwood v. Flannigan*, 104 U. S. 562 (1881); *Merrill v. Dawson*, Hempstead (C. Ct. of Ark.), 563 (1848); *Hinde v. Vattier*, 5 Pet. 398 (1831); *Jones v. Hays*, 4 McLean, 521 (1849); *Hanley v. Donaghue*, 116 U. S. 1 (1885).

The rule extends to state statutes. *Merchants Nat. Bk. v. McGraw*, 59 Fed. Rep. 972 (1894). So, following the analogy of the state courts, the federal courts will judicially recognise the law of any foreign country, establishing land titles in any state once part of that country. *U. S. v. Turner*, 11 How. 663 (1850); *Loree v. Abner*, 57 Fed. Rep. 159 (1893).

In like manner, the supreme court of the United States exercising an appellate jurisdiction from the circuit courts of the United States takes the same judicial cognisance as to state laws that the circuit courts themselves do. It is accustomed "constantly to take notice of and administer the jurisprudence of all the states." *Owings v. Hull*, 9 Peters, 607, 624 (1835), per Story, J. "Needing no averment or proof." *Hanley v. Donaghue*, 116 U. S. 1, 7 (1885); *Carpenter v. Dexter*, 8 Wall. 513 (1869). As is said in *Hanley v. Donaghue* (*ubi supra*), "whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here." "The law of any state of the Union, whether depending upon statutes, or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof." *Lamar v. Micou*, 114 U. S. 218 (1885).

Where the supreme court of the United States entertains a writ of error to a state court of last resort it takes the same judicial cognisance of the public laws of the state of the court said to be in error that the state court itself would take, "needing no averment or proof." *Hanley v. Donaghue*, 116 U. S. 1, 7 (1885).

Under these circumstances of a writ of error to a state court, the supreme court of the United States has, it will be noted, a narrower range of judicial cognisance than when sitting on appeal

from a circuit court of the United States and "does not take judicial notice of the laws of another state, not proved in that court and made part of the record sent up, unless by the local law that court takes judicial notice of it." *Liverpool Steam Co. v. Phenix Insurance Co.*, 129 U. S. 397, 445 (1888); *Hanley v. Donaghue*, 116 U. S. 1 (1885); *Renaud v. Abbott*, 116 U. S. 277, 285 (1886).

"The courts of the United States take judicial notice of the laws and judicial decisions of the several states." *Cheever v. Wilson*, 9 Wall. 108 (1869); *Elwood v. Flannigan*, 104 U. S. 562 (1881); *Liverpool Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, (1888).

But while it is the duty of these courts to take such cognisance, they may by rule or otherwise compel litigants to assist them in so doing, *e. g.* by setting out in their briefs all statutes relied upon. *School Dist. v. Ins. Co.*, 101 U. S. 472 (1879).

"FEDERAL QUESTION." — Where in a state court the provision of the federal constitution requiring "full faith and credit" to be given to the "public acts, records, and judicial proceedings" of another state is involved (Const. U. S. Art. IV. sec. 1, Stats. 1790, 11), the state court will take the same judicial cognisance of the laws of the state the validity of whose acts is in question that it takes of its own laws. The reason on which this rule is based is succinctly stated by the supreme court of Pennsylvania in *Ohio v. Hinchman*, 27 Pa. St. 479 (1856). "A judgment of this court, adverse to the right arising out of the federal constitution and legislation, would be reviewable in the Supreme Court of the United States, and there the states of the confederacy are not regarded as foreign states, whose laws and usages must be proved, but as domestic institutions whose laws are to be noticed without pleading or proof. It would be a very imperfect and discordant administration for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it follows, that in questions of this sort, we shall take notice of the local laws of a sister state in the same manner the supreme court of the United States would do on a writ of error to our judgment."

To same effect is *Paine v. Schenectady Ins. Co.*, 11 R. I. 411 (1876).

FOREIGN LAWS. — Judicial notice cannot be taken of foreign laws. As a general rule they must be alleged and proved like other facts. See *post* p. 52¹⁰.

The highest court of a state may be required, by statute, to take "judicial notice of the laws and the statutes of our sister states." *Hobbs v. Memphis & Charlestown R. Co.*, 9 Heisk. (Tenn.) 873 (1872).

Notice is not taken even when the foreign law, *e. g.* established rate of interest in other states, is printed as part of the general statutes of a particular state. *Insurance Co. of North America v. Forcheimer*, 86 Ala. 541 (1888).

If the foreign law is made part of the record in error before the supreme court of the United States it will be considered. *Green v. Van Buskirk*, 7 Wall. 139 (1868).

COORDINATE BRANCHES OF GOVERNMENT. — For reasons analogous to those requiring state courts to recognise the existence and composition of the national government and its international relations, all courts recognise the existence and composition of the government by which they are constituted, in its executive, legislative, and judicial branches. "It is certainly true that the courts will judicially recognise the public officers of the state, under whose laws and organisation they act as the chief executive, the heads of departments; judges of courts of general jurisdiction; attorneys for the state, sheriffs, and we see no reason why clerks of the courts should not also be included." *Major v. State*, 2 Sneed (Tenn.), 11 (1854), — a case deciding that where the clerk of the circuit court in one county transmits papers to the circuit court of another county, on a charge of venue, the seal of the court is not essential to the authentication of the transmitting clerk, whose signature will be judicially noticed. Courts will not require proof of the signature of the governor of their state or the date of his election and inauguration. *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235 (1866); *Deweese v. Colorado Co.*, 32 Tex. 570 (1870); *Hizer v. State*, 12 Ind. 330 (1859). "The court must take judicial notice of the changes made in the executive department." *Lindsey v. Atty.-Gen.*, 33 Miss. 508, 528 (1857). And courts will notice the accession of the *de facto* governor. *State v. Williams*, 5 Wisc. 308 (1856); and his appointment of A. as a district judge. *De la Rosa v. State*, Tex. Crim. App. (1893), 21 S. W. Rep. 192; and of the public proclamations of the governor, *e. g.*, in calling for troops. *Hanson v. South Scituate*, 115 Mass. 336 (1874). So it has been held by the supreme court of Louisiana that the signatures of former Spanish governors of their state need not be proved. *Jones v. Gale's Curatrix*, 4 Martin, 635 (1817).

Courts "are bound judicially to know who are the sheriffs of the several counties." *Ingram v. State*, 27 Ala. 17 (1855); *Alexander v. Burnham*, 18 Wisc. 199 (1864); *Thompson v. Haskell*, 21 Ill. 215 (1859); and their signatures. *Wood v. Fitz*, 10 Martin, 196 (1821). A court will take judicial notice of the civil officers of the county in which it holds its sittings. *Thielmann v. Burg*, 73 Ill. 293 (1874); and so of the signature of the recorder. *Scott v. Jackson*, 12 La. Ann. 640 (1857). So of the registers of the several counties of the state. *Fancher v. De Montegre*, 1 Head, 40 (1858); and the levee tax-

collector. *Templeton v. Morgan*, 16 La. Ann. 438 (1862); *Wethenbee v. Dunn*, 32 Cal. 106 (1867). "Courts are authorised and required," say the supreme court of Alabama, "to take judicial notice of the various commissioned officers of the state, and to know the extent of their authority, their official signatures, and their respective terms of office,—when such terms commence, and when they expire. The dates of these commissions are matters of public record in the executive department of the state government, being accessible to inquiry by all who may be concerned, and the law fixes the duration of each official term." *Cary v. State*, 76 Ala. 78 (1884); *Bennett v. State*, 1 Mart. & Yerg. 133 (1827). The supreme court of California holds that "the courts will take judicial notice of the officers of a county and the genuineness of their signatures; and when the law provides for the appointment of a deputy by one of these officers, courts will also judicially recognise such deputy and the genuineness of his signature." *Himmelmänn v. Hoadley*, 44 Cal. 213, 226 (1872). So the Pennsylvania courts take judicial notice of aldermen as public officers. *Fox v. Com.*, 81 * Pa. St. 511 (1875). Illinois courts take cognisance who are justices of the peace; *Graham v. Anderson*, 42 Ill. 514 (1867); and other civil officers, *Brackett v. People*, 115 Ill. 29 (1885), including "justices of the various courts of record of the State, and of their terms of office." *Vahle v. Brackenseik*, 145 Ill. 231 (1893). Probably Courts will not take cognisance of the official character of a deputy marshal. *Ward v. Henry*, 19 Wis. 76 (1865). They will not recognise the official character of a deputy sheriff. *State Bank v. Curran*, 10 Ark. 142 (1849); *Land v. Patteson*, Minor (Ala.) 14 (1820), he not being "commissioned in the name of the state or required by statute to take any oath of office." But where a statute authorised a superintendent of streets to appoint deputies, the courts of California "judicially recognise such deputy and the genuineness of his signature." *Himmelmänn v. Hoadley*, 44 Cal. 213 (1872). A deputy auditor general, "being a state officer known to the law," will be judicially recognised. *People v. Johr*, 22 Mich. 461 (1871).

Where the terms of all justices of the peace by law expire on a certain day the court will take notice of that fact. *Stubbs v. State*, 53 Miss. 437 (1876).

So the courts of Indiana "take notice, as matter of law, that the trustee of a civil township is also trustee of the school township. *Inglis v. Hughes*, 61 Ind. 212 (1878).

Such cognisance includes knowledge of the general elections at which such officers are voted for. *State v. Minnick*, 15 Ia. 123 (1863); *Ellis v. Reddin*, 12 Kans. 306 (1873). The reason is probably that given in *Davis v. Best*, 2 Ia. 96 (1853). "The August election is established by law, and the time it is held should be

judicially taken notice of." See also *Burnett v. Henderson*, 21 Tex. 588 (1858); *Lewis v. Supervisors*, 70 Ill. 65 (1873).

Of these requirements of judicial knowledge, the supreme court of Alabama say (*Gordon v. Tweedy*, 74 Ala. 237 (1883): "This cognisance may often extend far beyond the actual knowledge, or even the memory of judges, who may therefore resort to such documents of reference, or other authoritative sources of information as may be at hand, and may be deemed worthy of confidence." The court will not take cognisance of who are town constables. The fact is not "of public notoriety." *Doe v. Blackman*, 1 D. Chipman (Vt.) 109 (1797).

STATUTORY GEOGRAPHY. — Courts are required to take judicial notice of geographical or administrative subdivisions of the sovereignty by which they are constituted. *Vanderwerker v. People*, 5 Wend. 530 (1830); *McDonald v. DeCairl*, 1 Chan. Cham. 34 (1859); *State v. Powers*, 25 Conn. 48 (1856); *State v. Wagner*, 61 Me. 178 (1873); *Com. v. Desmond*, 103 Mass. 445 (1869); *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420 (1860); *U. S. v. Beebe*, 2 Dak. 292 (1880); *Smitha v. Flournoy's Adm.*, 47 Ala. 345 (1872); *Martin v. Martin*, 51 Me. 366 (1863); *Chesapeake & Canal Co. v. Baltimore & c. R. R. Co.*, 4 Gill & J. 1, 63 (1832); *Boston v. State*, 5 Tex. App. 383; *Woodward v. Chicago & c. R. R.*, 21 Wis. 309 (1867).

"Courts take notice of the local divisions of the state, as into counties, cities, towns, &c., and of the relative position thereof, but not of the precise boundaries and distances. And they are not bound to take judicial notice of the local situation and distances of the different places in counties from each other." *Goodwin v. Appleton*, 22 Me. 453 (1843); *Doyle v. Village of Bradford*, 90 Ill. 416 (1878); *Boston v. State*, 5 Tex. App. 383 (1879); *Gooding v. Morgan*, 70 Ill. 275 (1873); *Martin v. Martin*, 51 Me. 366 (1863). But the supreme court of Rhode Island, without citation of authorities, hold that "the courts are bound to take cognisance of the boundaries in fact claimed by the state." *State v. Dunwell*, 5 R. I. 127 (1855); and that of Iowa judicially knows that Race Island is in the jurisdiction of the adjoining state of Illinois. *Gilbert v. Moline Water Power & M'fg Co.*, 19 Ia. 319 (1865). So of the population of a county according to the United States census, if the legislature has classified counties on this basis. *Worcester Nat. Bank v. Cheney*, 94 Ill. 430 (1880); *State v. Marion Co. Ct. (Mo.)*, 31 S. W. 23 (1895). Judicial notice is taken of population as fixed by the census. *Hawkins v. Thomas*, 3 Ind. App. 399 (1891). So a territorial court is required to take cognisance of the limits and relative distances of the territory. *Hoyt v. Russell*, 107 U. S. 401 (1885). So far as the limits of county jurisdiction depend upon the construction of records, "it is purely a question of law for the court." *State v. Wagner*, 61 Me. 178 (1873).

Where a statute declared certain houses to be public, the court will "recognise such houses to be public places." *Graham v. Williams*, 27 S. W. Rep. 127 (1894), (Crim. Ct. Appeals of Tex.). "Judicial knowledge of the location of towns is limited to such places as are recognised by general statutes." *Field v. State* (Tex.), 24 S. W. Rep. 407 (1893); *Pennsylvania Co. v. Horton*, 132 Ind. 189 (1892). The public political act may be one by a former government, establishing the municipality. *Payne v. Treadwell*, 16 Cal. 220 (1860).

Courts are not required to know that a place is within a particular county. *Boston v. State*, 5 Tex. App. 383 (1879); *Cain v. State*, (Tex.) 25 S. W. Rep. 1119 (1894). But see *Gooding v. Morgan*, 70 Ill. 275 (1873); *Kidder v. Blaisdell*, 45 Me. 461 (1858); *Com. v. Wheeler*, 162 Mass. 429 (1894).

But they may do so if they see fit. "The court can take judicial notice of the lines of counties and the towns embraced in them." *Steinmetz v. Versailles Turnpike Co.*, 57 Ind. 457 (1877); *Ham v. Ham*, 39 Me. 263 (1855); *State v. Powers*, 25 Conn. 48 (1856); *Smitha v. Flournoy's Adm.*, 47 Ala. 345 (1872); *Lewis v. State*, 24 S. W. (Tex.) 903 (1894); and also that it is a railroad terminus and has a post office. *Central &c. Co. v. Gamble*, 77 Ga. 584 (1886).

Where the location of a place is referred to in public statutes the location must be recognised without proof. *Solyer v. Romanet*, 52 Tex. 562 (1880); *Martin v. Martin*, 51 Me. 366 (1863); *People v. Etting*, 99 Cal. 577 (1893); *People v. Curley*, 99 Mich. 238 (1894). So of the distance of a town from the county seat. *Bruson v. Clark*, 151 Ill. 495 (1894). See also *State v. Pennington*, 124 Mo. 388 (1894). Courts of California will take cognisance that there is only one city of 100,000 population in the state. *In re Constitutionality of Senate Bill 293*, 39 Pac. Rep. 522 (1895). In an Alabama case, *King v. Kent's Heirs*, 29 Ala. 542 (1857), the court state that as a certain town is mentioned in the state constitution as the capitol and in other public acts, they are "bound" to know that it is in Alabama, and also that as an act of congress establishes a land office there and it "has long been notoriously known and recognised" as a land office, they "are authorised" to take notice of the same fact.

In a later Alabama case, the court take the same view. "The public acts apprise us that Mobile is a municipal corporation of Alabama and where it is situated." *Alabama &c. Ins. Co. v. Cobb*, 57 Ala. 547 (1877). See also to same effect, *Houlton v. Chic. &c. R. R.*, 86 Wisc. 59 (1893). So a court will take notice of Indian reservations within their jurisdiction, and of the laws and proclamations establishing or regulating them. *U. S. v. Beebe*, 2 Dak. 292 (1880).

And that the Indian Territory is beyond the jurisdiction of Texas. *Conner v. State*, 23 Tex. App. 378 (1887).

For the same reasons, in many of the western states of the Union where political subdivisions, as well as the foundation of land titles, rest on government patents based on official surveys, the existence and location of the lines of such survey are among the facts of which courts are required to take cognisance. *Mossman v. Forrest*, 27 Ind. 233 (1866); *Desire v. Burleson*, 35 Neb. 238 (1892); *Atwater v. Schenck*, 9 Wisc. 160 (1859); *Quinn v. Champagne*, 38 Minn. 322 (1888); *Wright v. Phillips*, 2 Greene (Ia.) 191 (1849); *Gooding v. Morgan*, 70 Ill. 275 (1873); *Gardner v. Eberhart*, 82 Ill. 316 (1876); *Murphy v. Hendricks*, 57 Ind. 593 (1877); *Money v. Turnipseed*, 50 Ala. 499 (1874); *Muse v. Richards*, 70 Miss. 581 (1893). So of the relation of a certain town to a principal meridian will be noticed. *O'Brien v. Krockinski*, 50 Ill. App. 456 (1893). The United States supreme court say: "It is a matter of which this court will take judicial notice, that, by law, the country is divided into collective districts for internal revenue purposes, and in some states there are several of these districts with defined geographical boundaries." *U. S. v. Jackson*, 104 U. S. 41 (1881).

As to proof of these lines, as matters of public and general interest, as an exception to the rule against hearsay, see *post*, p. 412¹.

RULES OF PRACTICE. — Courts take cognisance of the rules of practice established in their own courts.

"And of the times when and the places where its sessions appointed by law are to be held." *Kidder v. Blaisdell*, 45 Me. 461 (1858); *Lindsay v. Williams*, 17 Ala. 229 (1850); *Ross v. Austill*, 2 Cal. 183 (1852). "Judicial notice is taken of the number of days the court is in session at each term." *Fabyan v. Russell*, 38 N. H. 84 (1859); *Durre v. Brown*, 7 Ind. App. 127 (1893).

But see *Gilliland v. Sellers*, 2 Oh. St. 223 (1853), *contra*.

"This court judicially knows that the fall term of the circuit court of Lowndes County begins on the fourth Monday in October in each year, and may continue three weeks; and that November 5th, 1873, was a day of the second week of said term." *Rodgers v. State*, 50 Ala. 102 (1874). To same effect, *Spencer v. Curtis*, 57 Ind. 221 (1877); *Davidson v. Peticolas*, 34 Tex. 27 (1870); *Lewis v. Wintrode*, 76 Ind. 13 (1881).

Courts will not take notice of the rules established by inferior tribunals. *Cutter v. Caruthers*, 48 Cal. 178 (1874); *Cherry v. Baker*, 17 Md. 75 (1860). Or of their adjournments. *Baker v. Knott*, Supreme Court of Idaho, 35 Pac. Rep. 172 (1893).

Courts are required to take judicial cognisance of their own records in a prior stage of the same case. *Dawson v. Dawson*, 29 Mo. App. 521 (1888); *Searles v. Knapp*, (So. Dak.) 58 N. W. 807 (1894); *State*

v. Ulrich, 110 Mo. 350 (1892); *State v. Bowen*, 16 Kans. 475 (1876); *Pagett v. Curtis*, 15 La. Ann. 451 (1860); *Hollenbach v. Schnabel*, 101 Cal. 312 (1894); *Yell v. Lane*, 41 Ark. 53 (1883); *Secrist v. Petty*, 109 Ill. 188 (1883); *State v. Schilling*, 14 Ia. 455 (1862); *Leavitt v. Cutler*, 37 Wisc. 46 (1875). Even in a case where the proceedings against the garnishee and the principal defendant were "virtually a portion of the same record." *Farrar v. Bates*, 55 Tex. 193 (1881); *Kenosha Stove Co. v. Shedd*, 82 Ia. 540 (1891).

But courts are not required to take judicial cognisance of their own records in other cases. *National Bank of Monticello v. Bryant*, 13 Bush (Ky.), 419 (1877); *Grace v. Ballou*, 4 So. Dak. 333 (1893); *McCormick v. Herndon*, 67 Wisc. 648 (1887). See also, *In re Manderson*, 51 Fed. Rep. 50 (1892).

Indeed a California case, speaking of another pending petition against the defendant in the case at bar, go so far as to say: "We apprehend that the court could not under any circumstances take judicial notice of the fact, except it were for mere calendar purposes." *Lake Merced Water Co. v. Cowles*, 31 Cal. 215 (1866).

So an affidavit in another case cannot be judicially noticed by the judge, though admissible in evidence if offered and the judge, in point of fact, personally remembers the affidavit. *Baker v. Mygalt*, 14 Ia. 131 (1862).

In the same way, a court cannot take judicial notice of the connection existing between two cases on its docket. *Banks v. Burnam*, 61 Mo. 76 (1875).

"But the courts of one state cannot judicially take notice of the laws and practice of another." *Newell v. Newton*, 10 Pick. 470 (1830).

Courts will take judicial notice who were its members at a particular time and "the term fixed by law for the commencement of its sessions." *Gilliland v. Sellers*, 2 Oh. St. 223 (1853).

And courts will take notice who are their officers. *Central Land Co. &c. v. Calhoun*, 16 W. Va. 361 (1880); *Montjoy v. State*, 78 Ind. 172 (1881); *Norvell v. McHenry*, 1 Mich. 227 (1849); *Dyer v. Last*, 51 Ill. 179 (1869). And of their signatures. *Buell v. State*, 72 Ill. 523 (1880).

Whether courts are required to take official notice of the *personnel* of inferior courts is in dispute. "The court are bound to take notice of all public acts and laws, without doubt; but whether they *must* know who are the justices or the chief justices of inferior tribunals certainly admits of question." *Ripley v. Warren*, 2 Pick. 592 (1824).

In *Davis v. McEnany*, 150 Mass. 451 (1890) the supreme judicial court of Massachusetts declined to take judicial cognisance of the clerk of a police court, deciding that the record itself should show his official character.

On the contrary, the Kentucky court of appeals recognises who are judges of the circuit courts of that state. *Kennedy v. Com.*, 78

Ky. 447 (1880). So the Illinois court of appeals. *Russell v. Sargent*, 7 Ill. App. 98 (1880). The supreme court of Pennsylvania, after some review of the authorities, are "disposed to take judicial notice" of the constitution of an inferior court. They treat the question as one of optional cognisance. "The rule," they say, "is that courts will take notice of what ought to be generally known within the limits of their jurisdiction. There seems to us to be as much reason for our having knowledge of who are in fact the judges of our constitutional courts, as for our having judicial knowledge of the heads of departments, sheriffs, etc., knowledge of whom is always presumed." *Kilpatrick v. Com.*, 31 Pa. St. 198 (1858); *Cincinnati, &c. R. R. v. Grames*, 8 Ind. App. 112 (1893). But see *County of San Joaquin v. Budd*, 96 Cal. 47 (1892).

Courts when required to take cognisance of facts which they do not actually know are constrained to resort to any appropriate source of information. "Information to guide their judgment may be obtained by resort to original documents in the public archives or to books of history or science or to any other proper source." *Hoyt v. Russell*, 117 U. S. 401 (1885); *Gonzales v. Ross*, 120 U. S. 605 (1886).

The Maryland courts "take judicial notice of the tribunals created by the constitution." *Tucker v. State*, 11 Md. 322 (1857).

In Louisiana, courts recognise the signature of all justices legally appointed by the governor. *Despau v. Swindler*, 3 Martin, n. s. 705 (1825).

This is in accordance with the general rule prevailing in that state : "We have more than once held that we would not require evidence of the official capacity of functionaries commissioned in this state, and would take notice of the offices held by them." *Follain v. Lefevre*, 3 Robinson, 13 (1842). So, in that state, when court officers take a bond in pursuance of law and file the same in court, no proof is needed of the officer's signature. *Wood v. Fitz*, 10 Martin, 196 (1821).

And so the supreme court of Alabama takes judicial notice of the resignation of a circuit judge, though without assigning any reason for their decision. *Ex parte Peterson*, 33 Ala. 74 (1858).

The Illinois courts take judicial notice who are the justices of the peace in their respective counties. *Graham v. Anderson*, 42 Ill. 514 (1867). Also who are the judges of inferior courts. *Vahle v. Brackenseik*, 145 Ill. 231 (1893); also the date of their ceasing to hold the office. *People v. McConnell*, 155 Ill. 192 (1895).

The Kings Bench of Lower Canada holds that courts will notice the appointment of one of their officers to be judge of another court. *Fay v. Miville*, 2 Rev. de Legis. 333 (1816). Notice will be taken of the jurisdiction of an inferior court as regulated by statute. *Nelson v. Ladd*, 4 So. Dak. 1 (1893).

LANGUAGE. — Courts take judicial cognisance of the ordinary meaning of words in the vernacular. Probably they are required so to do. *Com. v. Kneeland*, 20 Pick. 206, 241 (1838) ("blasphemy"); *Hill v. Bacon*, 43 Ill. 477 (1867); *Adler v. State*, 55 Ala. 16 (1876) ("malt liquor"); *Shubrick v. State*, 2 S. C. 21 (1870) ("sow"); *State v. Abbott*, 20 Vt. 537 (1848) ("steer").

"We take judicial notice of the true significance of all English words and phrases, and may resort for aid to any appropriate books of reference." *Grennan v. McGregor*, 78 Cal. 258 (1889).

The court may decline to hear evidence concerning the significance of words, the meaning of which it judicially knows; *e. g.* in a Massachusetts case, on trial of a complaint for violation of the Sunday law by keeping open a tobacconist's store, the defendant claimed that he was lawfully selling "drugs and medicines," and offered evidence of experts to show that tobacco and cigars had "a medicinal effect on the human system." The presiding justice excluded the evidence, and an exception to this ruling was overruled. "The court has judicial knowledge of the meaning of common words, and may well rule that guns and pistols are not drugs or medicines, and may exclude the opinions of witnesses who offer to testify that they are." *Com. v. Marzynski*, 149 Mass. 68 (1889). See also *Matthews v. Park*, 159 Pa. St. 579 (1894).

The court may not only refresh its memory by reference to dictionaries, etc., but may permit standard authorities, *e. g.*, Webster's Unabridged Dictionary, to be read to the jury for its definition of a disputed word. *Adler v. State*, 55 Ala. 16 (1876).

The court must study out the meaning of terms; *e. g.* "Congressional." *Atty.-Gen. v. Dublin*, 38 N. H. 459 (1859). But may require aid from the parties. *School Dist. v. Ins. Co.*, 101 U. S. 472 (1879). And use the testimony of experts. *Atty.-Gen. v. Dublin*, *ubi supra*.

In a New York case, the court without proof rendered judgment for the dollar value of a number of English "pounds." *Johnston v. Hedden*, 2 Johns. Cases, 274 (1801).

Whether courts will notice customary abbreviations is more in dispute. Apparently, this species of knowledge is more nearly analogous to those where cognisance is optional with the court, *i. e.*, dependent upon the knowledge or feeling of the particular judge. In an Alabama case the court say it "must judicially take notice of such abbreviations as 'Adm'r.' or acknowledge itself incompetent to understand the commonest writings." *Moseley's Adm'r v. Mastin*, 37 Ala. 216 (1861). So the usual abbreviations of proper names will be noticed. *Stephen v. State*, 11 Ga. 225, 240 (1852) ("Jas."); *Weaver v. McElhenor*, 13 Mo. 89 (1850) ("Christy"); *Sparks v. Sparks*, 51 Kans. 195 (1893) ("Dan"); *Studsill v. State*, 7 Ga. 2, (1849) ("Thos.").

On the other hand, the supreme court of Texas was unable judicially to know that "St. Louis, Mo." meant St. Louis in the state of Missouri. *Ellis v. Park*, 8 Tex. 205 (1852); or that "New Orleans, La." meant New Orleans in the state of Louisiana. *Russell v. Martin*, 15 Tex. 238 (1855). Apparently these two cases rest on an erroneous application of a prior case in the same court, *Andrews v. Hoxie*, 5 Tex. 171 (1849), where the court decide that they cannot judicially know that "The city of New Orleans," without more, means the city of that name in Louisiana. This apparently is correct. Most people in the United States know that there is a city of New Orleans in Louisiana. Whether there are other cities of the same name elsewhere is not, perhaps, so generally known as to dispense with proof.

Slang and phrases of peculiar or local usage must be proved. In the case of *Mayor &c. of Baltimore v. State*, 56 Md. 376, 468 (1859), where the legislature of Maryland had assumed control of the police force of Baltimore by the appointment of commissioners under a statute, providing "that no Black Republican or endorser or approver of the Helper Book" should be appointed to any office under the board, the court say: "We cannot understand, officially, who are meant to be affected by the proviso, and, therefore, cannot express a judicial opinion on the question."

But the court will take judicial notice of the phrase "gift enterprise" as used in a criminal statute. *Lohman v. State*, 81 Ind. 15 (1881).

And officially notice the meaning of the initials C. O. D. *State v. Intox. Liquors*, 73 Me. 278 (1882). But, on the contrary, the Missouri court of appeals "do not know that the meaning of the abbreviation 'C. O. D.' as used by expressmen, is sufficiently a matter of common knowledge that the circuit court could take judicial notice of it," and hold that its meaning is a question for the jury. *McNichol v. Pacific Express Co.*, 12 Mo. App. 401 (1882). Courts will notice surveyor's initials, not pretending "to be more ignorant than the rest of mankind." *Kile v. Yellowhead*, 80 Ill. 208 (1875). But the courts of Minnesota refuse to take cognisance of the meaning of "S² N. E.⁴ and N. W.⁴ S. E.⁴" *Keith v. Hayden*, 26 Minn. 212 (1879). To the same effect, *Power v. Bowdle*, 3 No. Dak. 107 (1893).

So a foreign language must be proved; *e. g.*, in a case where defendant was convicted of rape upon a woman named "Kurkowski," and there was evidence that her name was written Kurkowski, the court refused a motion in arrest of judgment, which was approved on report to the upper court. "There is no evidence tending to show that, though pronounced Kurkowski, it was not properly spelled Kurkowski. The courts of this state cannot take judicial cognisance of the proper orthography or pronunciation of

names in the Polish language." *State v. Johnson*, 26 Minn. 316 (1879).

CIRCULATING MEDIUM, etc. — The court and jury will take notice, without proof, of the legal coins made at the mint of the United States, pursuant to law and of foreign coins made current by law. *U. S. v. Burns*, 5 McLean, 23 (1849); also of what is legal tender. *Chesapeake Bank v. Swain*, 29 Md. 483, 502 (1868); *Daily v. State*, 10 Ind. 536 (1858). Also that United States notes "are prima facie of a commercial value equal to that imputed by their face." *Gady v. State*, 83 Ala. 51 (1887).

So courts take notice of the nature and denominations of the circulating medium. *Lampton v. Haggard*, 3 Monr. (Ky.) 149 (1826); and that there are "classes of notes and bills in circulation as money" other than bankbills. *Hart v. State*, 55 Ind. 599 (1877). That "nickels" are of value need not be proved. *Mallory v. State*, 62 Ga. 164 (1878). But in a case requiring damages to be assessed according to the value of the bank notes of the Bank of the Commonwealth, the court say: "We are not at liberty to take judicial notice of the value of the paper of the bank at any particular time." *Feanster v. Ringo*, 5 Monr. (Ky.) 336 (1827). To same effect, as to depreciation of Confederate money, see *Modawell v. Holmes*, 40 Ala. 391 (1867). That there was depreciation will be noticed. *Keppel v. R. R.*, Chase's Dec. 167 (1868). But the American courts will not take notice of the value of Canadian currency. *Kermott v. Ayer*, 11 Mich. 181 (1863).

Courts recognise also, without proof, the legal standards of weights and measures prevailing in their particular jurisdictions. Courts recognise the capacity of a "pint." *Reid v. McWhinnie*, 27 Q. B. U. C. 289 (1868).

Matters of Optional Cognisance. — The rule which allows a court, in its discretion, to know, without proof, certain facts relevant to the issue, because undisputed and generally known, performs much the same office in the trial of causes, as do the rules of pleading. It relieves the administration of justice from the consideration of matters on which the parties are agreed or which they do not care to contest, and enables the tribunal to devote its entire attention to the real points in dispute.

In every trial of an issue of fact one or more propositions are in dispute between the parties. Involved or connected with the proof or disproof of these are often found relevant facts which are not disputed. They are usually facts of notoriety, frequently capable of being settled, one way or the other, with slight exertion. To expedite business, as well as to avoid the anomaly of solemnly proving what is not really disputed, (and generally every one knows to be as stated), the court will usually dispense with the necessity of prov-

ing such fact and assume it to be as claimed until proof is demanded. The court will instruct the jury on this basis.

Apparently a party has the right to dispute such a fact, even at the risk of a new trial if the jury be persuaded contrary to the court's knowledge.

Such judicial cognisance is not usually taken in respect to matters in issue. "A matter which could legitimately be the subject of inquiry in a court could not well be said to be so well established and to have acquired such notoriety as to come within the judicial knowledge of the court." *Chicago &c. R. R. v. Champion*, 32 N. E. (Ind.) 874 (1892).

As facts of judicial cognisance are usually those of notoriety, equally open to all, the jury may be assumed to know them equally with the court, even without the aid of an instruction from the bench.

FACTS OF THE ALMANAC.—Whether the facts stated in the almanac are of optional or required cognisance is not entirely clear upon the American authorities. The permissive form of expression is usually employed, and that fact has controlled the classification. There is much, however, in the *dictum* of Pollock, C. B. (*Tutton v. Darke*, 5 H. & N. 649 (1860)). "The almanack is part of the law of England." A reputable almanac may be introduced in evidence to show the time of the rising of the moon on a certain day. *Case v. Perew*, 46 Hun, N. Y. Supreme Court, 57 (1887); *Munshower v. State*, 55 Md. 11 (1880); the hour of sunset on a certain day, *State v. Morris*, 47 Conn. 179 (1879); or the hour of sunrise, *People v. Chee Kee*, 61 Cal. 404 (1882).

The almanac is not used as evidence of the fact stated. It merely reminds the tribunal of a fact which it already is supposed to know. "The almanac in such cases is used, like the statute, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury." *State v. Morris*, 47 Conn. 174 (1879).

Indeed, the almanac need not be introduced in evidence at all to be available to the party who relies on a fact stated in it. Counsel are entitled to refer to such fact in argument and to cite the almanac in support of it. "However often departed from as a matter of convenience, the rule is that matters of which judicial notice is taken, including the dates in the almanac, do not require to be put in evidence at all." *Wilson v. Van Leer*, 127 Pa. St. 371 (1889). "The fact [time of sunrise] for the proof of which the almanac was offered, was one of those facts of which a court may take judicial notice; formal proof of it was therefore unnecessary. It would have been sufficient to have called it to the knowledge of the judge at the trial; and if his memory was at fault or his information not sufficiently full and precise to induce him to act upon it, he had the right to resort to an almanac, or any other book of reference,

for the purpose of satisfying himself about it; and such knowledge would have been evidence." *People v. Chee Kee*, 61 Cal. 404 (1882).

In like manner, the coincidence of the days of the week with those of the month will be noticed. "It is the duty of the court to notice the days of the week on which particular days of the month fall." *Philadelphia &c. R. R. v. Lehman*, 56 Md. 209, 226 (1881); *Wilson v. Van Leer*, 127 Pa. St. 371 (1889); *McIntosh v. Lee*, 57 Ia. 356 (1881); *Brennan v. Vogt*, 97 Ala. 647 (1892); *Ecker v. First Nat. Bk. of Windsor*, 64 Md. 292 (1885); *Reed v. Wilson*, 41 N. J. Law, 29 (1879); *First Nat. Bank &c. v. Kingsley*, 84 Me. 111 (1891); *Williams v. Brandenburg*, 6 Ind. App. 97 (1892). *Morgan v. Burrow* (Miss.), 16 So. 432 (1894).

For the same reason the regular procession of the seasons need not be proved but will be judicially recognised. *Ross v. Boswell*, 60 Ind. 235 (1877); *Tomlinson v. Greenfield*, 31 Ark. 557 (1876); *Patterson v. McCausland*, 3 Bland (Md.) Chan. 69 (1830); *Loeb v. Richardson*, 74 Ala. 311 (1883). For example, that cotton is not planted in January. *Wetzler v. Kelly*, 83 Ala. 440 (1887).

But a court cannot be required to take cognisance of a fluctuating event, *e. g.* the particular time of ripening of any particular crop at a particular place under the vicissitudes of any particular season. *Dixon v. Niccolls*, 39 Ill. 372 (1866). Or that each concentric layer of a tree denotes a year's growth. *Patterson v. McCausland*, 3 Bland (Md.) Chan. 69 (1830). Or that the "pasture season" ends at "any particular day or time." *Gove v. Downer*, 59 Vt. 139 (1886).

So the courts will take judicial notice of the facts set forth in the almanac as to the rising of the moon. *Case v. Perew*, 46 Hun, 57 (1887); *Munshower v. State*, 55 Md. 11 (1880); *Mobile & Birmingham R. R. v. Ladd*, 92 Ala. 287 (1890). The hour of sunset. *State v. Morris*, 47 Conn. 179 (1879).

So courts may take cognisance of other usual manifestations of natural laws, *e. g.*, the normal limits in height of a human being. "We know that the average height of man is less than six feet. That the average length of the body from the lower end of the spine to the top of the head is less than thirty-six inches. That the measurement varies but little in adults, and that the chief difference in the height of men is in the length of their lower limbs." *Hunter v. N. Y. &c. R. R.*, 116 N. Y. 615, 622 (1889).

Or of the ordinary length of human life. *Scheffler v. Minneapolis &c. R. R.*, 32 Minn. 518 (1884); *Johnson v. Hudson R. R. Co.*, 6 Duer, 633, 648 (1857); *Lessee of Allen v. Lyons*, 2 Wash. 475 (1811); *Floyd's Heirs v. Johnson*, 2 Littell, 109 (1822). The court may use the "Mortality tables." *Kansas City &c. R. R. Co. v. Phillips*, 98 Ala. 159 (1892). But see *Price v. Conn. Mut. Life Ins. Co.*, 48 Mo. App. 281 (1892), *contra* where the court decline to take

cognisance of the value of an insurance policy, established in this way, "depending partly on extraneous facts and partly on the accuracy of an intricate computation."

The court will judicially notice the usual limits of the period of gestation. *Whitman v. State*, 34 Ill. 360 (1870); *Ronan v. Dugan*, 126 Mass. 176 (1879).

HISTORICAL FACTS. — An instance of facts of optional cognisance is found in matters of public history. Such as the existence of the late civil war (between the United and Confederate States of America). *Woods v. Wilder*, 43 N. Y. 164 (1870); *Iron Mfg. Co. v. Gaskell*, 2 Lea (Tenn.), 742 (1879); *Bishop v. Jones*, 28 Tex. 294 (1866).

And of the particular acts which led to it. *Swinerton v. Columbia Ins. Co.*, 37 N. Y. 174 (1867). Or happened during its continuance, *Cuyler v. Ferrill*, 1 Abb. (U. S. Circ. Ct.) 169, 178 (1867); *Buford v. Tucker*, 44 Ala. 89 (1870). So the courts will notice the issuance and general value and progressive depreciation of the Confederate paper currency. *Lumpkin v. Murrell*, 46 Tex. 51 (1876). But it is error to take judicial cognisance that in a particular county it was hazardous to person or property to hold certain political views. "This fact ought to have been proved, and not been thus assumed by the court as a historical fact, of which the court could take judicial notice." *Simmons v. Trumbo*, 9 W. Va. 358 (1876). Of the course of trade to which the war gave rise. *The Northrop*, Blatch. Pr. Cases, 235 (1862); *The Peterhoff*, Blatch. Prize Cases, 463, 509 (1863). The sending of gold to a premium. *U. S. v. 4000 American Gold Coin*, 1 Woolw. 217 (1868). And of the financial and social condition in which it left the Confederate States. "The general and common condition of the country and its people is a part of its history. This is presumed to be known to courts and to every one." *Ashley's Adm'x v. Martin*, 50 Ala. 537 (1873); *Foscue v. Lyon*, 55 Ala. 440 (1876). So slavery was recognised as existing in certain states as part of the history of the country. *Jack v. Martin*, 12 Wend. 311, 328 (1834).

So the abolition of slavery will be judicially noticed. *Ferdinand v. State*, 39 Ala. 706 (1866). And the interdicting of commercial intercourse during the pendency of hostilities. *Rice v. Shook*, 27 Ark. 137 (1871). But notice will not be judicially taken of the relative positions of the opposing armies at any particular period of the war. *Kelley v. Storey*, 6 Heisk. 202 (1871). Or of the military orders issued by a particular commander. *Burke v. Miltenberger*, 19 Wall. 519 (1873).

The courts of Georgia take judicial notice of "Sherman's march to the sea," and its date. *Williams v. State*, 67 Ga. 260 (1881). So the adoption of the British order in council (regulating lights on vessels and the rules of navigation) by other commercial nations

will be noticed as a historical fact. *The Scotia*, 14 Wall. 171 (1871).

So judicial notice will be taken in Illinois of historical facts attending the settlement of Dakota. *Miller v. MacVeagh*, 40 Ill. App. 532 (1891).

In taking notice of Col. J. C. Fremont's career in California in 1846 and 1847 the United States Court of Claims say: "The court will take judicial notice of the leading and controlling events in the history of the country and of the official relations of the principal actors therein to the government; and, in elucidation thereof, also of less important transactions of general and public interest immediately connected therewith, when they have passed into commonly received authentic history." *De Celis v. U. S.*, 13 Ct. of Claims, 117 (1877).

The court can take notice of the results of the census "and resort for information to appropriate documents of reference." *People v. Williams*, 64 Cal. 87 (1883); *State v. Braskamp*, 87 Ia. 588 (1893).

So the court will take notice that in 1844 the Methodist Episcopal church of the United States was divided. *Humphrey v. Burnside*, 4 Bush (Ky.), 215 (1868).

To the contrary effect is *Sarahass v. Armstrong*, 16 Kans. 192 (1876).

Cognisance will be taken of county history relating to the choice of a county seat. *Ross v. Anstill*, 2 Cal. 183 (1852).

But see, to the effect that notice will not be taken of the date of the organisation of a county, *Trimble v. Edwards*, 84 Tex. 497 (1892).

"Courts, in construing a statute, may with propriety recur to the history of the times when it was passed." *U. S. v. Union Pacific R. R.*, 91 U. S. 79 (1875), where the construction of statutes relating to the Union Pacific Railroad was aided by consideration of the circumstances under which the road was projected. "The history of a country, its topography and condition, enter into the construction of the laws which are made to govern it, and we must notice these facts judicially." *Williams v. State*. 64 Ind. 553 (1878); *Smith v. Speed*, 50 Ala. 276 (1873); *Ohio Life Ins. Co. v. Debolt*, 16 How. 416 (1853).

So the early history of the settlement of the country may be noticed in deciding questions of jurisdiction as based on occupancy and acts of ownership. *Keyser v. Coe*, 37 Conn. 597 (1871).

Naturally, courts are especially apt to take judicial notice of the history of their own state. *Henthorne v. Doe*, 1 Blackf. 157 (1822); *Hart v. Bodley*, Hardin (Ky.) 98 (1807); *Walden v. Canfield*, 2 Rob. (La.) 466 (1842); *Paine v. Treadwell*, 16 Cal. 220 (1860); *Lewis v. Harris*, 31 Ala. 689 (1858); *Gonzales v. Ross*, 120 U. S. 605 (1887).

So of the building of the first great state railroad. *Hart v. Balt. & O. R. R.*, 6 W. Va. 358 (1873).

And so also of the historical source of land titles in their particular jurisdiction. *Smith v. Stevens*, 82 Ill. 554 (1876); *Bonner v. Phillips*, 77 Ala. 427 (1884); *Keyser v. Coe*, 35 Conn. 597 (1871). A treaty of cession of territory from one state to another, and the extinguishment of the Indian title in the same, may be judicially noticed. *Howard v. Moat*, 64 N. Y. 262 (1876).

So "the history of the Six Nations of Indians is a part of the history of the state, of which the courts will take notice." *Ibid.* Notice has been taken of the existence and conditions of land-grant contracts. *Hatch v. Dunn*, 11 Tex. 708 (1854).

And the cession of territory by a state to the United States will be judicially recognised, probably, also, on other grounds. *Lasher v. State*, 30 Tex. App. 387 (1891). So the surrender of the office of governor will be recognised. *State v. Boyd*, 34 Neb. 435 (1892). But the historical fact should not be such as "concerns individuals or mere local communities." *McKinnon v. Bliss*, 21 N. Y. 206 (1860).

So the action of one of the public officers in making military records of the muster rolls of the state's volunteer regiments will be noticed. "It is part of the history of the state of which we must take notice." *Commissioners v. May*, 67 Ind. 562 (1879). And that the state remained loyal during the American war of the Rebellion. *Douthitt v. Stinson*, 63 Mo. 268 (1876). Or was under military rule. *Gates v. Johnson Co.*, 36 Tex. 144 (1871); *Killebrew v. Murphy*, 3 Heisk. 546 (1871). Though these are matters of judicial cognisance where the court, if in doubt, may resort to any desirable method of refreshing his knowledge, such historical facts have been occasionally treated as to be established by evidence, and a distinction has been taken;—to the effect that historical facts "of general and public notoriety" may be established by "reputation" or proved by "historical works of known character and accuracy," while the work of a living author in reach of compulsory process can be proved by summoning the author himself. *Morris v. Lessee of Harmer*, 7 Pet. 554 (1833). See also *Whiton v. Albany &c. Ins. Co.*, 109 Mass. 24 (1871).

If these historical facts are disputed and made part of the issue between the parties, "some evidence of them must be adduced." *McKinnon v. Bliss*, 21 N. Y. 206 (1860); *Gregory v. Baugh*, 4 Rand. (Va.) 611 (1827).

Courts are justified in judicially knowing the current history of the times, — for example, the court will understand that to say of a clergyman "that Iowa Beecher business of his lost him a situation," is an imputation of adultery, "inasmuch as courts have no right to be ignorant of the meaning of current phrases which everybody

else understands." *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251 (1879). So that "sack" means a fund used for political corruption. *Edwards v. San Jose &c. Co.*, 99 Cal. 431 (1893). Courts will take cognisance that private and town boundaries have "almost, if not quite uniformly, been run out according to the magnetic meridian." *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235 (1866). In the same way courts may take cognisance of the state of local feeling due to recent events. *Geist v. Detroit City R'way*, 91 Mich. 446 (1892). That companies of a certain class are incorporated in a certain way is said to be "a matter of public history" which the court "cannot refuse to notice." *Ohio &c. Co v. Debolt*, 16 How. 435. So "that there was a great complaint of tax collectors . . . speculating in warrants." *Smith v. Speed*, 50 Ala. 276 (1873). Of the differences of christian sects, and between the King James and Douay versions of the Bible. *State v. District Board*, 76 Wisc. 177 (1890).

In *Bank of Augusta v. Earle*, 13 Peters, 519 (1839), at page 590, the action of certain corporations is spoken of as "a matter of history which this court are bound to notice" as if the judicial cognisance were not optional. Probably this is an inadvertence, unless, as sometimes used, the constraint spoken of is a moral rather than a legal one.

GEOGRAPHICAL FACTS. — "We recollect of no decision that the courts are *ex officio* to notice the great lakes, rivers, and mountains of the state as parts of it, and lying within its limits, but it can hardly be doubted that the courts would notice, of course, the great geographical features of the state." *Winnepiseogee Lake Co. v. Young*, 40 N. H. 420 (1860); *State v. Thompson*, 85 Me. 189 (1892).

The question as to whether a place has been recognised by the legislature as within a certain county, presents nothing for a jury to try. It is for the court alone. *State v. Wagner*, 61 Me. 78 (1873). Even in the absence of express legislative recognition the question is one for the court. "A criminal might as well call for the opinion of the jury upon the regularity of the judge's commission or the validity of the election of the governor by whom he was appointed. The administration of justice becomes possible only by assuming that certain things have been regularly and definitely settled, and are so to remain." *State v. Wagner*, 61 Me. 178 (1873). The Michigan Supreme Court say of the contention that it should not judicially notice "Lake St. Clair" in that state that it "is not worthy serious consideration." *People v. Brooks*, 101 Mich. 98 (1894).

So the supreme court of Wisconsin "take notice of the fact that the capacity of many small navigable streams in this state to float logs and lumber into the larger streams below and to market has been greatly increased by the erection of dams across them."

Tewksbury v. Schulenberg, 41 Wisc. 584 (1877). But where there are no jurisdictional facts, *e. g.*, a crime in a vessel at sea, the question whether the spot of the occurrence is within the boundaries of the state is one for the jury. *U. S. v. Jackalow*, 1 Black (U. S.) 484 (1861).

So of the boundaries of a city, and the course, &c., of a river frequently mentioned in the statutes of the state. *DeBaker v. So. Cal. R. R.* (Cal.) 39 Pac. 610 (1895).

The position of a long established railroad is a geographical fact of which judicial cognisance is taken. *Miller v. Texas &c. Ry.*, 83 Tex. 518 (1892). And of their termini. *Galveston, &c. R. R. v. Johnson* (Tex. Civ. App.), 29 S. W. 428 (1895).

So a court will take notice that a deponent resided more than thirty miles from the place of trial. *Hinekley v. Beckwith*, 23 Wisc. 328 (1868). Or more than one hundred. *Mut. &c. Life Ins. Co. v. Robison*, 58 Fed. Rep. 723 (1893). In a late Illinois case it is said that "the court will take judicial notice of the geography of the country, and that Batavia was only some two miles distant from the court-house at Geneva, where the court was held." *Bruson v. Clark*, 150 Ill. 495 (1894).

In Indiana, speaking of the Mississippi and its navigable tributaries, the court say: "The courts take judicial notice of such streams, as they form part of the geography of the country and their navigability is known as forming a part of the common public history." *Neadrhouser v. State*, 28 Ind. 257 (1867).

In the case of *Peyroux v. Howard*, 7 Pet. 324, 341 (1833), the court say: "We think we are authorised judicially to notice the situation of New Orleans, for the purpose of determining whether the tide ebbs and flows as high up the river as that place," citing *The Apollon*, 9 Wheat. 362, 374 (1824); *U. S. v. La Vengeance*, 3 Dall. 297 (1796); *Trenier v. Stewart*, 55 Ala. 458 (1876). So, that the Mersey is a tidal river. *Whitney v. Gauche*, 11 La. Ann. 432 (1856).

In a Massachusetts case, the court say: "We think that the superior court might take judicial notice that the Connecticut River, above the dam at Holyoke, does not, either by itself or by uniting with other waters, constitute a public highway over which commerce may be carried on with other states or with foreign countries, although, if the court had entertained any doubt on the subject, it might have required evidence to be produced." *Com. v. King*, 150 Mass. 221 (1889).

So the courts of Michigan know judicially that all of the St. Clair River is not in Michigan. *Cummings v. Stone*, 13 Mich. 70 (1864). And those of Alabama that no part of the Tallapoosa River is in the city of Montgomery. *City Council of Montgomery v. Montgomery &c. Plankroad*, 31 Ala. 76 (1857).

It has been happily said (1 Whart. Evid. § 339) that in this connection the minuteness of the knowledge expected "is in inverse proportion to the distance."

The courts of Alabama take notice that in a certain county all the rivers are of fresh water. *Walker v. Allen*, 72 Ala. 456 (1882).

By statute the courts of California are required to take cognisance of the streets of San Francisco. *Brady v. Page*, 59 Cal. 52 (1881).

The courts of Indiana decline to take judicial cognisance that a railroad did not extend into a particular county, there being no law on the subject. But such notice is taken of the geographical position of a certain station. *Indianapolis &c. R. R. v. Stephens*, 28 Ind. 429 (1867).

But whether a particular section of a state is "arid" within the meaning of an irrigation statute is a question of fact. *McGhee &c. Co. v. Hudson*, 85 Tex. 587 (1893).

Courts will take notice that the territory of a town has been incorporated into a city, but not that the plotting of lots is the same. *Ritchie v. Catlin*, 86 Wisc. 109 (1893).

So of the number of railroads centering in a particular town. *Texas &c. Rd. v. Black*, 87 Tex. 160 (1894).

COMMON PROPERTIES OF MATTER. — Among the facts which courts will, in their discretion, consider established without the introduction of evidence are many of the ordinary mechanical, chemical, or industrial processes, as commonly known and carried on in the community. For example, "A court cannot refuse to take judicial cognisance that photography is the art producing facsimiles, or representations of objects by the action of light on a prepared surface. As such it has been so long recognised, the mechanical and chemical process employed and the scientific principles on which it is based are so generally known, that it would be vain for a court to decline cognisance of it." *Luke v. Calhoun Co.*, 52 Ala. 115 (1875). "The process [photography] has become one in general use, so common that we cannot refuse to take judicial cognisance of it as a proper means of producing correct likenesses." *Udderzook v. Com.*, 76 Pa. St. 340 (1874). "We do not fail to notice, and we may notice judicially, that all civilised communities rely upon photographic pictures for taking and presenting resemblances of persons and animals, of scenery and all natural objects, of buildings and other artificial objects." *Cowley v. People*, 83 N. Y. 464 (1881); see also *Cozzens v. Higgins*, 1 Abb. Ct. of App. Dec. 451 (1866). So the nature and operation of elevated railroads may be judicially noticed. *Bookman v. N. Y. Elevated R. R. Co.*, 137 N. Y. 302 (1893).

Among matters of common knowledge in the natural world of which courts require no proof is the freezing of substances in a

chamber, the atmosphere of which is not in contact with the freezing force, and a patent for a device embodying that principle is void, though the defence is not relied on in the pleadings. *Brown v. Piper*, 91 U. S. 37 (1876).

So of the common habit of compressing, for "the convenience of trade," several packages of various commodities, wool, feathers, plug tobacco, etc., into a single parcel. *King v. Gallun*, 109 U. S. 99 (1883).

But the supreme court of Indiana refuse to take notice of the action of a freight car under certain conditions. "The natural laws of which courts take judicial notice are such as are of uniform occurrence and invariable in their action." *Chicago, &c. R. R. v. Champion*, 32 N. E. Rep. 874 (1892).

So the fact that the value of unimproved fleeces is depreciated by the undue quantity of hair on the belly, flanks, etc. of the animals, "is common knowledge, taught by all text-books on sheep, and within the judicial cognisance of the courts." *Lyon v. Marine*, 55 Fed. Rep. 964 (1893).

MISCELLANEOUS MATTERS. — It is natural that many facts of which courts are at times and in their discretion content to take judicial cognisance do not admit of precise classification. Indeed, many of them depend rather upon the personal views of the individual judge than upon any more definite rule.

Facts which are so generally known that every well-informed person knows them or ought to know them, need not be proved, and will be judicially recognised without proof. In a case where the supreme court of Alabama take notice of the "American Table of Mortality" as a basis for the calculation of annuities dependent on the probability of human life, it is said: "This cognisance may extend far beyond the actual knowledge or even the memory of judges, who may therefore resort to such documents of reference or other authoritative sources of information as may be at hand and may be deemed worthy of confidence. The rule has been held in many instances to embrace information derived informally by inquiry from experts." *Gordon v. Tweedy*, 74 Ala. 232 (1883). The fact that the great inland transportation of the country is largely done by connecting lines, each forwarding goods for a continuous carriage, may be judicially noted. *McDonald v. Western R. R.*, 34 N. Y. 497 (1866); *Burlington, &c. R'way Co. v. Dey*, 82 Ia. 312 (1891). So the tendency of objects to frighten horses "is part of the common knowledge possessed by all intelligent persons of mature years." *Cleveland, &c. R. R. v. Wynant*, 114 Ind. 525 (1887).

The usual duration of a voyage across the Atlantic is "part of the experience and common knowledge of the day and as such are legitimate grounds for the judgment of the court." *Oppenheim v. Wolf*, 3 Sandf. (N. Y.) Chan. 571 (1846). So of the rapidity of travel made possible by modern inventions. *Hipes v. Cochran*, 13 Ind. 175

(1859). And the custom of through checking passengers' baggage. *Isaacson v. N. Y. Cen. R.*, 94 N. Y. 278 (1884).

So the court will take notice that cigars are not "drugs and medicines." "Ordinarily whether a substance or article comes within a given description is a question of fact, but some facts are so obvious and familiar that the law takes notice of them and receives them into its own domain. . . . Cigars are manufactured articles familiar to everybody." *Com. v. Marzynski*, 149 Mass. 68 (1889).

So the court "must take judicial notice of the nature and qualities of tobacco." *Application of Jacobs*, 98 N. Y. 98, 113 (1885).

The peculiar nature of lotteries and the method in which they are carried on will be judicially noticed. *Salomon v. State*, 28 Ala. 83 (1856).

Courts will notice the variations of the magnetic meridian. *Bryan v. Beckley*, 6 Litt. (Ky.) 91, 95 (1809).

No proof is needed that an assault with a loaded pistol and a hoe is an assault with a deadly weapon. "A hoe, both in popular and legal signification, is *per se* a deadly weapon, — fully as much so as a loaded pistol or an axe." *Hamilton v. People*, 113 Ill. 34 (1885). In *White v. Phoenix Ins. Co.*, 83 Me. 279 (1891) the court in taking cognisance that vacating the premises increased the risk, declared that expert evidence to prove it "was incompetent and unnecessary."

Evidence is not needed that coal oil is inflammable. "Courts do not require proof that fire will burn, or powder explode, or gas illuminate, or that many other processes in nature and art produce certain known effects." *State v. Hayes*, 78 Mo. 307 (1883).

But the supreme court of Vermont, in construing an insurance policy, has refused to take judicial notice that "gin" and "turpentine" are "inflammable liquids." *Mosley v. Ins. Co.*, 55 Vt. 142 (1882).

In the same way, speaking of a statute forbidding the manufacture of oleomargarine and butterine, the supreme court of Michigan say: "We are not called upon or qualified by any knowledge which we possess to determine the merits or defects of the well-known substances which this statute was intended to suppress." *Northwestern Mfg. Co. v. Chambers*, 58 Mich. 381 (1885).

The supreme court of Alabama, after laying down the rule as to what matters are of what is "sometimes called judicial knowledge, frequently, common knowledge," as that "all men know them and therefore they need not be proved," go on to say that the rule for measuring corn in the shock does not fall within the definition. *South & N. Ala. R. R. Co. v. Wood*, 74 Ala. 449 (1883). The supreme court of Missouri has refused to take notice of the danger of contagion from Texas cattle. *Bradford v. Floyd*, 80 Mo. 207 (1883). The same court later reversed this decision and cite with approval the language of Judge Harlan, in delivering the opinion of the

supreme court of the United States in *Minnesota v. Barber*, 136 U. S. 313 (1890), on a similar question:—"If a fact, alleged to exist, and upon which the rights of parties depend, is within common experience and knowledge, it is one of which the courts will take judicial notice." *Grimes v. Eddy*, (Mo.), 28 S. W. 756 (1894).

It has been held in Michigan that the fact that an empty box car in the limits of the highway will not frighten ordinary horses is among the "things which do not require to be pleaded or to be made the subject of specific proof," and that it is error to leave the question to the jury. *Gilbert v. Flint, &c. R. R.*, 51 Mich. 488 (1883).

So "the court, from its general knowledge, can judicially say that whiskey is an intoxicating liquor; and the jury might so find upon their general knowledge." *Schlicht v. State*, 56 Ind. 173 (1877), quoting with approval the language of *Carmon v. State*, 18 Ind. 450 (1862) followed in *Egan v. State*, 53 Ala. 162 (1876). In *Frese v. State*, 23 Fla. 267 (1887), to the same effect, the question is treated as a matter regarding the meaning of words, and the dictionary is relied on. Where the liquor has been classified in a statute as "spirituous," it will be so recognised. *Reid v. McWhinnie*, 27 Q. B. U. C. 289 (1868). So of other distilled liquors. "Jurors are not to be presumed ignorant of what everybody else knows. . . . Now every one who knows what gin is, knows not only that it is a liquor, but also that it is intoxicating. And it might as well have been objected that the jury could not find that gin was a liquor, without evidence that it was not a solid substance, as that they could not find that it was intoxicating without testimony to show it to be so." *Com. v. Peckham*, 2 Gray, 514 (1854).

The courts of Indiana take cognisance that brandy is intoxicating and that "the addition to the term 'brandy' of the word 'blackberry' does no more than designate it as a particular kind of brandy." *Fenton v. State*, 100 Ind. 598 (1884). So that "apple brandy" is intoxicating "is a matter of common knowledge of which the court will take judicial notice." *Thomas v. Com.*, 90 Va. 92 (1893).

On the other hand, "beer," being a generic term covering a wide range of liquids of different alcoholic composition, is not judicially known to be intoxicating. It is necessary to prove in any individual case that the beer was intoxicating or that it was of a kind judicially known to be intoxicating. *Blotz v. Rohrbach*, 116 N. Y. 450 (1889); *Klare v. State*, 43 Ind. 483 (1873). But see *Nevin v. Ladue*, 3 Denio, 437 (1846); *Briffitt v. State*, 58 Wisc. 39 (1883), *contra*. "It seems to be well settled that the word 'beer' in its ordinary sense denotes a beverage which is intoxicating." *Maier v. State*, 2 Tex. Civ. App. 296 (1893); *U. S. v. Ducourneau*, 54 Fed. Rep. 138 (1891). And the court will take cognisance that lager beer is a malt liquor. "The government might almost as well be

required to prove that gin or whiskey or brandy is a strong liquor as to prove that lager beer is a malt liquor." *State v. Goyette*, 11 R. I. 592 (1877). And intoxicating. *State v. Church* (So. Dak.), 60 N. W. 143 (1894). But see *Rau v. People*, 63 N. Y. 277 (1875); *Tinker v. State*, 90 Ala. 647 (1890). Of "rice beer" the Georgia supreme court say: "Some beverages, such as whiskey, brandy, &c., are in such common and notorious use as intoxicants that no proof is requisite to stamp them with this character. But rice beer is comparatively a rare liquor. Whether it will produce intoxication or not ought to be proved." *Bell v. State*, 91 Ga. 227 (1892).

Courts in Indiana refuse to take notice that a fence sufficient to restrain sheep will restrain hogs. *Enders v. McDonald*, 5 Ind. App. 297 (1892).

That business men refer to "American Lloyds," "The Green Book," and the "Record Book," for the standing of ships will be judicially recognised. *Slacovich v. Oriental Mut. Ins. Co.*, 108 N. Y. 56 (1888). "All persons are supposed to know the curiosity of children and their disposition to play around and about objects of unusual appearance." *Spengler v. Williams*, 67 Miss. 1 (1889).

GENERAL CONSIDERATIONS. — Such action on the part of the court in dispensing with proof is optional. Proof may be required by the judge even if the fact is not disputed by a party litigant; and he may decline to know the fact until it is proved, to his satisfaction or that of the jury.

On the other hand, if he prefers, the judge may satisfy himself of the truth of a fact by resorting to any source of information he may choose; *e. g.* by resorting to public documents not introduced in evidence. *U. S. v. Teschmaker*, 22 How. 392, 405 (1859); *Brown v. Piper*, 91 U. S. 37 (1875); *Whiton v. Albany &c. Ins. Co.*, 109 Mass. 24 (1871).

In so doing, he is satisfying his own mind or conscience. He is not limited to evidence which would be competent, if objected to, before a jury. A newspaper may be as useful as an exemplification under the great seal of state; *e. g.*, in *Scheffler v. Minneapolis &c. R. R.*, 32 Minn. 518 (1884), mortality tables of recognised standing were received as bearing on the "expectation of life" of a person killed by a locomotive. To the same effect, *Johnson v. Hudson R. R. Co.*, 6 Duer, 633, 648 (1857).

So a history of the Southern Confederacy, "The Lost Cause," may be resorted to for dates and events. *Swinnerton v. Columbian Ins. Co.*, 37 N. Y. 174 (1867).

The court may require the aid of the parties. *School Dist. v. Ins. Co.*, 101 U. S. 472 (1879).

"Nor does the fact that the information thus sought by the judge has been laid before him in the presence of the jury without any distinct ruling that it was designed for the court alone, give a party

the right to insist that the jury shall pass upon it." *State v. Wagner*, 61 Me. 178 (1873); *Mobile &c. R. R. v. Ladd*, 92 Ala. 287 (1890).

But a court is not at liberty, any more than a jury is, to supply evidence of facts in issue from its personal knowledge where such facts are not part of the common stock of information of the community, — as that plaintiff's lawyer had ceased to practise. *Day v. De Course*, 12 Low. Can. Jur. 265 (1868).

Thus where the fact is relevant, that A. is a resident of another state must be proved, though it is a fact known to individual members of the court. *Wheeler v. Webster*, 1 E. D. Smith (N. Y.) 1 (1850); *Brown v. Piper*, 91 U. S. 37 (1876). So it is error for a court to refer a case on inspection because under the pleadings it apparently involved a number of items. This is matter for evidence. *Cassidy v. McFarland*, 139 N. Y. 201 (1893).

But see *Secrist v. Petty*, 109 Ill. 188 (1883), where there are apparently *dicta* to the effect that a judge may supply facts not generally known, from his own knowledge.

So courts will not take notice of the newspapers published in any particular county. *Atkeson v. Lay*, 115 Mo. 538 (1893).

Speaking of the general tendency to extend the range of optional judicial cognisance to meet the growth of art, science, and general knowledge, the Alabama supreme court say: "There is a prudent limitation to be put upon this principle so as to confine it to matters of a general and public nature or such as do not concern individuals or local communities. The facts must be of such age or duration as to have become established as part of the common knowledge of well-informed persons, at least." *Georgia &c. R. R. v. Gaines*, 88 Ala. 377 (1889); *Morris v. Edwards*, 1 Ohio, 189 (1823).

CHAPTER III.

HOW QUESTIONS OF FACT TRIED—FUNCTIONS OF JUDGE IN JURY TRIALS.

§ 21A. TRIAL by jury may, at least in a rudimentary form, be traced back to the times of our Saxon ancestors. In 1846 the creation of modern County Courts afforded suitors an opportunity of in future determining for themselves whether their disputes should be settled by a single judge, or by the unanimous verdict of five jurors. They by an overwhelming majority pronounced in favour of the judge.¹ In the High Court also the tendency of litigants now is to dispense with the services of a jury. The respective merits and demerits of Trial by Jury will be found impartially discussed in the Second Report of the Common Law Commissioners in 1853.²

§ 21B. The provisions now in force in the High Court (Order XXXVI. rr. 2—7a) are too long to set out at length here. They are discussed in detail in most of the Books on Practice.³ Their general effect⁴ is that in actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, a trial with a jury may be had by a party,³ if, when he is a plaintiff, in his notice of trial, or if, when he is a defendant, he, by notice given by him, within four days from the time of the service of notice of trial, or within such extended time as the court or a judge may allow, signify his desire to have the issues of fact tried by a judge with a jury, upon which the same shall be so tried; but that in all other cases trial without a jury is the normal mode of trial, and a jury can only be had by special order obtained

¹ In the County Court Return for the year 1893, published Nov., 1894, the following figures appear:—"Actions determined with a jury, 1,430; without a jury, 677,171." The additional cost of a jury is, in the County Courts, only 5s.

² Pp. 3—6.

³ See, *e.g.*, the Annual Practice for 1894, pp. 683 et seq. A list of causes and matters assigned exclusively to the Chancery Division is contained in 36 & 37 V. c. 66, § 34.

⁴ *Timson v. Wilson*, 1888 (Lindley, L.J.).

under O. XXXVI. rr. 3,¹ 6,² or 7a.³ The effect of this Order has been that the number of causes tried in the High Court of Justice without a jury are closely approaching the number of those which are tried with a jury.⁴

§ 21c. In divorce causes, by a rule made in July, 1880,⁵ though the rules first cited are inapplicable,⁶ the action is heard, if damages be not claimed, before the court without a jury, but if damages are claimed, a common jury is as of course summoned. In either case any party may apply by summons for a direction that the cause be tried in a different manner, or by a special jury.⁷ Trials in the Admiralty Division of the High Court are almost invariably without a jury. There is, however, power (O. XXXVI. r. 44) to summon a jury, though it is said never to have been exercised since the Judicature Acts.⁸

§ 21d. In criminal cases an accused, either by indictment or information, has still the right to be tried "per legale iudicium parium suorum." In civil causes, however, the case is widely different.

§ 22. Lord Hardwicke has observed that it is of the greatest importance to the law of England, and to the subject, that the powers of the judge and jury be kept distinct.⁹ But important as this undoubtedly is, it is, even at the present day, not very perfectly effected. The general principle, that the judge must determine the law, and the jury the fact, is not, and cannot be disputed;¹⁰ but in the application of this principle, embarrassing

¹ Giving power to order a trial by jury in Chancery actions.

² Which preserves the right to have, on application within ten days after notice of trial, an order for a trial by jury in all purely common law actions. *Jenkins v. Bushey*, 1891 (Lindley, L.J.).

³ Giving general power to a judge to order trial by jury at any time.

⁴ The judicial statistics for 1892 (published November, 1893) show (p. 9) that there were tried in that year, in the Common Law and Chancery Divisions together, 808 actions with juries, and 763 without juries.

⁵ Rules in Div. and Mat. Causes, r. 205.

⁶ Ord. LXVIII. r. 1.

⁷ See Oakley's Divorce Practice, p. 61.

⁸ See Williams and Bruce, Admiralty Practice, 449.

⁹ See remarks to the above effect per Ld. Cairns, in *Metropolitan Ry. v. Jackson*, 1877, cited post, note to § 37A.

¹⁰ In *R. v. The Dean of St. Asaph*, 1783, Ld. Mansfield declared, "that the fundamental definition of trial by jury depended upon the universal maxim, *ad quæstionem juris non respondent juratores; ad quæstionem facti non respondent iudices*"; and added—"Where a question can be proved by the form of pleading, the

questions not unfrequently arise, from the experienced difficulty of defining with clearness the obscure and shifting boundaries of law and fact.

distinction is preserved upon the face of the record, and the jury cannot encroach upon the jurisdiction of the court; when, by the form of pleading, the two questions are blended together, and cannot be separated upon the face of the record, the distinction is preserved by the honesty of the jury. The constitution trusts that, under the direction of a judge, they will not usurp a jurisdiction which is not in their province. They do not know, and are not presumed to know, the law: they are not sworn to decide the law; they are not required to decide the law. . . . It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it *in their power* to do wrong, which is a matter entirely between God and their own consciences." 21 How. St. Tr. 1039, 1040. Mr. Hargrave, in a note to 1 Co. Litt. 155 b, which is an elaborate essay on this subject, states that "the *immediate and direct* right of deciding upon questions of law is intrusted to the judges; that in a jury it is only *incidental*; that in the exercise of this incidental right, the latter are not only placed under the superintendence of the former, but are in some degree controllable by them; and, therefore, that in all points of law arising on a trial, juries ought to show the most respectful deference to the advice and recommendation of judges." In America, Mr. Justice Story has said: "The learned counsel for the prisoner contends that in criminal cases, and especially in capital cases, the jury are the judges of the law, as well as of the fact. My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact, and includes both. In each, they must necessarily determine the law, as well as the fact. In each,

they have the physical power to disregard the law, as laid down to them by the court. But I deny that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen, and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it, but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law, as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err in laying down the law to the jury, there is an adequate remedy for the injured party by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it. If I thought that a jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law,—that it is his privilege and truest shield against oppression and wrong,—I

§ 23. The duty of a judge presiding at a trial by jury is four-fold:—First, he must decide all questions respecting the admissibility of evidence; secondly, he must instruct the jury in the rules of law, by which the evidence, when admitted, is to be weighed; thirdly, he must determine, as a legal question, whether there be any evidence fit to be submitted to the jury for their consideration; and lastly, he must explain and enforce those general principles of law that are applicable to the point at issue.¹

§ 23A. First, then, speaking generally, all questions as to the *admissibility* of evidence are for the judge. It frequently happens that this depends on a disputed fact, in which case all the evidence adduced both to prove and disprove that fact must be received by the judge, and—however complicated the facts or conflicting the evidence²—must be adjudicated on by him *alone*.³ For example, the judge alone must decide a question of whether a confession should be excluded on account of some previous threat or promise, and to do this has to determine, first, whether the threat or promise was really made; and, secondly, whether, if made, it was sufficient in law to warrant the exclusion of the evidence;⁴ if a dying declaration be tendered, the judge alone decides whether it has been satisfactorily proved that the deceased believed, when he made it, that he was on the point of death;⁵ where the receipt in evidence of a deposition depends on the inability of the deponent to attend the trial, whether the sickness of the witness, or other special cause disabling him from attendance, has been satisfactorily proved;⁶ whether the declarant in a question of pedigree has been

feel it my duty to state my views fully and openly on the present occasion.” *U. S. v. Battiste*, 1835 (Am.). See further, on this interesting subject, 2 Wynne’s *Eunomus*; Bushell’s case, 1670; Franklin’s case, 1731; and *R. v. Woodfall*, 1770.

¹ Among the questions propounded by the Irish Parliament to the judges of that country in 1641, was one, “whether the judge or jurors ought to be judge of the matters of fact,” to which the judges replied, that, “although the jurors be the sole judges of matter of fact, yet the judges of the court are judges of the *validity of the evidence*, and of the

matters of law arising out of the same, wherein the jury ought to be guided by them.” 2 Nalson’s Coll. of State Pap. 575, 582, Lond. 1683.

² As to this see *Panton v. Williams*, 1841, cited *infra*, n. ⁴ to § 28.

³ *Bartlett v. Smith*, 1843.

⁴ See 1 Stark. r. 523, n. *b.*, 1816.

⁵ So resolved by all the judges, in two cases cited by Parke, B., in *Bartlett v. Smith*, 1843; and in one case cited by Ld. Ellenborough, in *R. v. Hucks*, 1816. These cases virtually overrule *R. v. Woodcock*, 1787, where Eyre, C.B., left the question to the jury.

⁶ *D. of Beaufort v. Crawshay*, 1866.

proved to be a deceased member of the family—and this even though the relationship of the declarant happens to be the very question at issue in the cause;¹ and whether or not an attesting witness, of whose signature proof is offered, has absented himself from the trial by collusion with the opposite party.² In like manner the judge alone decides upon the admissibility of the evidence where the question is whether a document has been duly executed or stamped;³ or whether it comes from the right custody;⁴ or whether sufficient search has been made for it to admit secondary evidence of its contents;⁵ or whether notice to produce it has been duly served;⁶ or whether, in the event of its being produced under notice, it be the original paper required;⁷ or whether it is protected as being a confidential communication;⁸ or whether a witness objected to on the ground of unripeness or imbecility of mind is competent to give evidence.

§ 24. Again, where evidence is offered of acts done in places other than the place in dispute, it is for the judge to decide, in the first instance, whether there is such a unity of character in these different localities as to render evidence affecting the one admissible with reference to the other. He also has to pronounce whether acts relied on as such amount to evidence of ownership,⁹ or whether witnesses have proved a general usage in trade¹⁰ or a custom (as the case may be). The general rule is, that where evidence is by law admissible for the determination of the point raised, the judge is bound to lay it before the jury; but that the question whether the evidence is admissible or not, is for the judge alone.

§ 24A. Whenever the rule just indicated applies, however, the credibility and weight of the evidence after it has been admitted are entirely for the jury, who may consider all the circumstances of the case, including those already proved before the judge, and give

¹ *Doe v. Davies*, 1847. See *Hitchins v. Eardley*, 1871.

² *Egan v. Larkin*, 1842 (*Brady, C.B.*) (Ir.).

³ *Bartlett v. Smith*, 1843; *Dunsford v. Curlew*, 1859 (*Hill, J.*). See *Stowe v. Querner*, 1870.

⁴ *Bp. of Meath v. M. of Winchester*, 1836; *Doe v. Keeling*, 1848 (*Ld. Denman*).

⁵ *Bartlett v. Smith*, 1843 (*Alder-*

son, B.).

⁶ *Harvey v. Mitchell*, 1841 (*Parke, B.*).

⁷ *Froude v. Hobbs*, 1859 (*Byles, J.*); *Boyle v. Wiseman*, 1855; overruling *Jones v. Fort*, 1828.

⁸ *Cleave v. Jones*, 1852. See, also, *R. v. Hill*, 1851.

⁹ *Doe v. Kemp*, 1831 (*Bosanquet, J.*).

¹⁰ *Lewis v. Marshall*, 1844.

such evidence only the credit which, upon the whole, they think it deserves.¹ The judge merely decides whether there is, *primâ facie*, any reason for presenting it at all to the jury; and his decision on this point, if erroneous, may be reviewed by the court above.²

§ 25. Secondly,³ it is the duty of the judge to point out to the jury any rule of law, which either renders evidence on any particular point unnecessary, or which gives any particular species of evidence peculiar weight, or which defines how a certain fact must be proved. Thus, he should distinctly explain the nature of any presumptions, which may apply to the point at issue, distinguishing such as are conclusive from those which are liable to be rebutted by counter evidence; and again, dividing this latter class into those presumptions upon which the jury are bound to act, in the absence of conflicting testimony, and those upon which it is merely expedient, or allowable, to rely. Again, if by common or statute law any document, when proved, becomes conclusive evidence of the facts it states, the judge must point out to the jury that the existence of such facts cannot be disputed or denied, and that the only question for their deliberation is, whether or not the document be duly proved. If, too, the uncorroborated testimony of a single witness be insufficient by law to establish guilt (as, for instance, in charges of treason or perjury), the judge must acquaint the jury with the nature and extent of this rule. Even where a conviction founded upon such testimony as the jury have before them would be strictly legal (as in the case of an accomplice becoming witness for the Crown), the judge would not properly discharge his duty unless he warned the jury against placing implicit reliance upon statements coming from such a suspicious quarter. Great caution and tact are, however, necessary on the part of the judge if he thinks it right (as he may do) to tell the jury his opinion respecting matters of fact, since this may arouse the jealous feelings of a jury, and excite them, in their anxiety to prove their independence, to pronounce an unjust verdict.⁴

¹ *Wellstead v. Levy*, 1831 (Parke, J.); *Doe v. Davies*, 1847 (Ld. Denman); *Ross v. Gould*, 1828.

² *Cleave v. Jones*, 1852 (Martin, B.).

³ See *supra*, § 23.

⁴ "Few things incite me more to repel a doctrine than intolerant attempts to force it on my understanding." See Dr. Channing's Works, Vol. III. p. 319. Ld. Bacon, in his advice to Hutton, J.,

§ 25A. Thirdly;¹ the judge must, at the close of each case, determine whether *any* evidence has been given on which the jury can *properly* find the question for the party on whom the onus of proof lies; and if no such evidence exists, he ought to withdraw the question from the consideration of the jury, and direct, either a non-suit to be entered if the onus be on the plaintiff, or a verdict to be found if the onus be on the defendant.² It is not always easy to act upon this somewhat vague rule which (hardly less vaguely) is sometimes said to be that a judge should withdraw the case from the jury, unless there be *reasonable* evidence on which *reasonable* men could *reasonably* or *fairly* find a verdict.³ But a judge will not often go astray if in every *doubtful* case he takes the opinion of the jury, and leaves the question, as to how far he was justified in thus acting, to be decided thereafter by the court. And, whenever there is conflicting evidence on a question of fact, he *must* leave the consideration of it for the decision of the jury, whatever his own opinion may be respecting its weight.⁴

§ 26. Lastly;⁵ the judge must explain to the jury what principles of law are applicable to the point in issue. To do this correctly, he must distinguish questions of law from questions of fact, which is, in ordinary cases, no very difficult task. For instance, on a charge of larceny, he lays down, as a general proposition of law, that all persons who take and remove the personal chattels of another without such other's consent, and with a felonious intent, are guilty of the crime charged; and then, according to the circumstances of the case, he explains, with more or less particularity, what constitutes a taking, removing, &c. These, obviously, are questions of law, and together form the major premiss of the syllogism. The jury decide whether it is proved that the goods

says, "You should be a light to jurors to open their eyes, but not a guide to lead them by their noses." Bac. Works, Vol. VII. p. 271, ed. Montagu.

¹ See *supra*, § 23.

² *Ryder v. Wombwell*, 1868; approved of and adopted in *Metrop. Ry. Co. v. Jackson*, 1877; and in *Dubl. W. & W. Ry. Co. v. Slattery*, 1878 (Ld. Hatherley and Ld. Blackburn).

³ See *Dublin, W. & W. Ry. Co. v. Slattery*, 1878 (Ld. Coleridge). On the kindred question as to setting aside verdicts which there was no sufficient evidence to support, see *Webster v. Friedeburg*, 1886; *Solomon v. Bitton*, 1881.

⁴ *Dublin, W. & W. Ry. Co. v. Slattery*, 1878, H. L. See, also, *Metrop. Ry. Co. v. Jackson*, 1877; post, § 37, n. ⁴.

⁵ See *supra*, § 23.

have been taken and removed in such a manner, and with such an intent, as the judge has previously instructed them will amount to larceny. These are questions of fact, and together form the minor premiss. Lastly comes the conclusion of guilt or innocence, which may either be drawn by the jury applying to the facts which *they* find the rules of law as interpreted by the judge; or by their finding the facts specially (but not the *mere evidence* on which the facts are founded¹), and leaving the court to apply the law to such facts, and pronounce the final decision. Simple, however, as this process appears to be, the line between law and fact has, in a certain class of cases, been very indistinctly drawn, and in these, therefore, the respective duties of the judge and jury are not clearly defined. For instance, if the question be whether a certain party had probable cause for doing an act, or whether he has done an act within a reasonable time, or with due diligence, it may be difficult to say whether the definition of what constitutes probable cause, reasonable time, or due diligence, be for the judge or the jury, and specious arguments are not wanting in favour of the claims of either party. In truth, the expressions just mentioned constitute neither matters of fact, nor matters of law, exclusively, but are rather matters of quality or opinion, which are generally termed “mixed cases.” They form, in logical phrase, the middle term, and are alike common to both the premisses, which are respectively intrusted to the judge and jury, and upon which the ultimate decision must proceed.²

§ 27. It is, however, necessary to see how far this subject is governed by actual decisions which have taken place on it, and as to whether the questions arising in particular cases are to be regarded as matters of law or of fact.

§ 28. First: A question of *probable* cause must, it is now clearly established,—albeit the wisdom of the rule has been stoutly disputed,³—be decided exclusively by the judge, and the jury can only be permitted to find whether the facts alleged in support of the presence or absence of probability, and the inferences to be

¹ Hubbard v. Johnstone, 1810 (Wood, B.); Harwood v. Goodright, 1774 (Ld. Mansfield); Mires v. Solobay, 1678.

² See, on this difficult subject, 12 Law Mag. 53—74; 1 St. Ev. 512—526.

³ Lister v. Perryman, 1870, H. L.; Hicks v. Faulkner, 1881.

drawn therefrom, really exist.¹ Thus, in an action for a malicious prosecution, the jury, if the evidence on the subject be conflicting, may be asked whether or not the defendant, at the time when he prosecuted, *knew* of the existence of those circumstances which tend to show probable cause, or *believed* that they amounted to the offence which he charged; and if they negative either of these facts, the judge will decide as a point of law that the defendant had no probable cause for instituting the prosecution.² The rule of law as to the respective functions of a judge and of a jury in such cases is based on the assumption that judges are more competent than juries to determine the question how far it may have been proper for a person to have instituted a prosecution.³ It is equally binding, however numerous and complicated the facts and inferences may be.⁴ Indeed, it would be impracticable to lay down any hard-and-fast rule as to what cases are "complicated." Besides, it would be inconsistent to hold that a rule, applicable to a simple case, should not equally apply where the facts were complicated.⁵ Any difficulty in the application of the rule is, moreover, more apparent than real, for it rarely happens but that some leading facts exist in each case, which present a broad distinction to the view, without having recourse to the less important circumstances.⁶ The judge has a right to act upon all the uncontradicted

¹ *Michell v. Williams*, 1843; *Panton v. Williams*, 1841; *Hailes v. Marks*, 1861; *Sutton v. Johnstone*, 1787; *Mitchell v. Jenkins*, 1833; *Hinton v. Heather*, 1845 (*Alderson, B.*); *West v. Baxendale*, 1850. On this subject see, generally, *Abrath v. North Eastern R. Co.* (1886).

² *Turner v. Ambler*, 1847. The absence, however, of belief must be proved by the plaintiff, and cannot be inferred from the mere fact that the defendant had made use of the charge for an unfair purpose: *id.* See, also, *Broad v. Ham*, 1839; *Haddrick v. Heslop*, 1848; *Heslop v. Chapman*, 1853.

³ *Fraser v. Hill*, 1853 (*Ld. Cranworth*).

⁴ In *Panton v. Williams*, 1841, *Tindal, C.J.*, observes, "We take the broad question between the parties to be this: whether, in a case

in which the question of reasonable or probable cause depends, not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, that if they find the facts proved, and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge. And we are all of opinion that it is the duty of the judge so to do." See *Rowlands v. Samuel*, 1850; *Douglas v. Corbett*, 1856.

⁵ *Panton v. Williams*, 1841 (*Tindal, C.J.*), pronouncing judgment of the Ex. Ch.

⁶ *Id.*

facts, and it is only where some doubt is thrown upon the credibility of the witnesses, or where some contradiction occurs, or some inference is attempted to be drawn from some former fact not distinctly sworn to, that he is called upon to submit any question to the jury.¹

§ 29. Although, as to "*probable cause*," the question is for *the judge*, yet, on the other hand, as to the *reasonableness* of the belief or suspicion, upon which a party acts in causing an arrest or in detaining goods, is a question for *the jury* to decide.² Thus, if a magistrate, sued for false imprisonment, rely, under not guilty by statute, upon want of notice of action or the like, the question whether he believed, with some colour of reason, and *bonâ fide*, that he was acting in pursuance of his lawful authority, so as to entitle him to the protection of the statute, is, in strictness, one for the jury to determine, if the plaintiff desire their opinion to be taken on the evidence.³ But if, as commonly happens, these questions be first submitted to the judge on an application for a nonsuit, and the plaintiff does not then desire them to be left to the jury, the plaintiff will be bound by the decision of the judge, if the court think it warranted by the evidence.⁴

§ 30. The question of *reasonable time* is a more difficult one. Upon some subjects, indeed, of frequent recurrence, the courts, for the sake of commercial convenience, have laid down precise rules as to what constitutes this. In these cases the duty of the jury is clearly confined to the simple task of ascertaining whether the facts proved fall within the rules or not.

§ 30A. For example, reasonable time for notice of dishonour of a bill of exchange means,⁵—according as the parties live in the same or in different places,—either that the letter containing notice should be so posted that in the due course of delivery it would arrive on the day following that on which the writer has received intelligence of dishonour;⁶ or that such letter should be

¹ *Michell v. Williams*, 1843 (Alderson, B.).

² *Wedge v. Berkeley*, 1838; *Annett v. Osborne*, 1840 (Ir.); *Hazeldine v. Grove*, 1844; *Hughes v. Buckland*, 1846.

³ *Hazeldine v. Grove*, 1844, *supra*.

⁴ *Hazeldine v. Grove*, 1844; *Abrath v. North Eastern Ry. Co.*, 1886, *supra*.

See post, § 38.

⁵ See, now, 45 & 46 V. c. 61 ("The Bills of Exchange Act, 1882"), § 49, sub-s. 12, which codifies the law as stated in the text. See as to previous law, 1866, *Hirschfield v. Smith*, 1841 (Erle, C.J.).

⁶ *Stocken v. Collin*, 1841; *Smith v. Mullett*, 1809 (Ld. Ellenborough);

posted before the departure of the mail on the day following the receipt of intelligence; ¹ or if there be either no post on that day,² or only one starting at an unreasonable hour in the morning,³ then on the next day (thus giving the writer an additional day). If a bill be presented through a banker, one day more is allowed for giving notice of dishonour than if it were presented by the party himself.⁴ The holder of a bill has in general but one day to give notice to all the parties against whom he intends to enforce his remedy, though each of the indorsers in turn has *his* day,⁵ and the holder may avail himself of a notice duly given by any other party to the bill.⁶ And the holder of a cheque, or of a bill or note payable on demand, must, in general, present the instrument for payment on or before the day following that on which it was received;⁷ though in these cases the term "reasonable time" may sometimes receive a different construction, regard being had to the nature of the instrument, the usage of trade, and the particular facts.⁸

§ 31. Generally, the rule as to the time thus allowed applies not only as between the parties to a cheque,⁹ but as between banker and customer with regard to its presentation, unless, indeed, circumstances exist from which a contract or duty on the part of the banker to present earlier, or later, can be inferred.¹⁰ It, however, does not apply to claims by the holder of a cheque against the drawer, unless during the delay the fund has been lost, as, *e.g.*, by the banker's failure.¹¹ When, however, the rule is applicable, it matters not, so far as the liability of the

Hilton *v.* Fairclough, 1811 (Lawrence, J.); Rowe *v.* Tipper, 1853 (Maule, J.).

¹ Williams *v.* Smith, 1819. See Shelton *v.* Braithwaite, 1841.

² Geill *v.* Jeremy, 1827 (Lord Ten-terden).

³ Hawkes *v.* Salter, 1830; Bray *v.* Hadwen, 1816; Wright *v.* Shawcross, 1819.

⁴ Alexander *v.* Burchfield, 1845 (Tindal, C.J.); Haynes *v.* Birks, 1804; Scott *v.* Lifford, 1808; Langdale *v.* Trimmer, 1812. See 45 & 46 V. c. 61, § 49, subs. 13.

⁵ Rowe *v.* Tipper, 1853; Dobree *v.* Eastwood, 1827. See, however, Glad-

well *v.* Turner. 1869.

⁶ Chapman *v.* Keane, 1835; Rowe *v.* Tipper, 1853 (Jervis, C.J.).

⁷ Rickford *v.* Ridge, 1810; Bod-dington *v.* Schlencker, 1833; Moule *v.* Brown, 1838. See Bailey *v.* Boden-ham, 1864.

⁸ 45 & 46 V. c. 61, §§ 45, subs. 2; 74, subs. 2; and 86, subs. 2.

⁹ See Hopkins *v.* Ware, 1869.

¹⁰ Hare *v.* Henty, 1861. See Pri-deaux *v.* Criddle, 1869.

¹¹ Robinson *v.* Hawksford, 1846; Serle *v.* Norton, 1841 (Ld. Abinger); Laws *v.* Rand, 1857. In these cases no time less than six years is deemed unreasonable.

drawer is concerned, whether the presentation for payment be made by the party himself or by his banker. Thus, when an uncrossed cheque, given on the 10th of March, was paid into payee's bankers' on the 11th, and presented by them on the 12th, but the bankers on whom it was drawn had stopped payment early that morning, the payee failed to recover the amount of the cheque from the drawer, because the presentment for payment had not been made within a reasonable time, and the bankers at the time of their failure had sufficient funds of the drawer's to pay the cheque.¹ Had the payee in this case stipulated that his bankers' names should be crossed upon the cheque, or had the drawer discounted his cheque in the country, the result would have been otherwise, for the drawer then would have been taken as agreeing that presentment should be made through a banker, and the steps actually taken were in conformity with this course.²

§ 32. With regard to the time for the presentation of instruments for payment, it has been held that, as a general rule, an instrument payable at a banker's must be presented within banking hours;³ and one payable elsewhere, at any time when the drawer may be expected to be found at his place of residence or business, though it be as late as eight or nine o'clock in the evening.⁴ If, however, a banker appoint a person to attend at the office after banking hours for the purpose of returning an answer to a presentment, and such person does return an answer before midnight, no objection can be taken to the unreasonableness of the hour when the presentment was made;⁵ and the same rule would seem to prevail if a bill be *personally presented* to the acceptor before twelve o'clock at night on the day that it falls due.⁶

§ 32A. With regard to a reasonable hour for a demand or tender of rent *on the land*, the common law is that it must, in order to create or avoid a forfeiture, be made before sunset, this being a rule of convenience adopted to prevent the necessity of one party waiting for the other till midnight. But if the tenant actually

¹ Alexander v. Burchfield, 1842.

² Id. (Tindal, C.J.). See 45 & 46 V. c. 61, §§ 76—82; and Heywood v. Pickering, 1874.

³ Parker v. Gordon, 1808; Elford v. Teed, 1813.

⁴ Wilkins v. Jadis, 1831; Jameson v. Swinton, 1810, Barclay v. Bailey, 1810 (Ld. Ellenborough).

⁵ Garnett v. Woodcock, 1817.

⁶ See Startup v. Macdonald (1841) (Parke, B.).

meet the lessor, either on or off the land, *at any time* of the last day of payment, and tender the rent, it will be sufficient, provided there was time before midnight to receive and count the money tendered.¹

§ 33. The law as to what is a reasonable hour for the delivery of goods has been much discussed.² Where a jury found by special verdict that certain oil, which the defendant had agreed to purchase of the plaintiffs, was tendered to the defendant (who must consequently, it is clear, have been then at his place of business) at half-past eight in the evening of the last day allowed for delivery; that there was full time for the plaintiffs to have delivered, and for the defendant to have examined, weighed, and received the whole before the next (a Sunday) morning; but that the time of tendering was unreasonably late, the Exchequer Chamber held (reversing the Common Pleas, and Lord Denman *dissentiente*), that the plaintiff was entitled to recover. Alderson, B.,³ thus laid down the general rule:—"Wherever, in cases not governed by peculiar customs of trade, the parties oblige themselves to the performance of duties within a certain number of days, they have until the last minute of the last day to perform their obligation. The only qualification that I am aware of to this rule is, that in acts requiring time in order that they may be completely performed, the party must, at all events, tender to do the act at such period before the end of the last day, as, if the tender be accepted, will leave him sufficient time to complete his performance before the end of that day. In the case of a mercantile contract, however, the opposite party is not bound to wait for such tender of performance beyond the usual hours of mercantile business, or at any other than the usual place at which the contract ought to be performed. The party, therefore, who does not make his tender at that usual place, or during those usual hours, runs a great risk of not being able to make it at all. In this case the plaintiffs have had the good fortune to meet with the defendant, and to make a tender to him in sufficient time. And I think, under these circumstances, that the defendant was

¹ *Startup v. Macdonald*, 1841 (Paterson, J.; Alderson, B.; Parke, B.), reversed by Ex. Ch. in 1843.

² Especially in *Startup v. Macdonald*, *supra*.

³ In *Startup v. Macdonald*, 1841.

bound to accept the goods, and is liable in damages for not accepting them."¹

§ 34. The law is, again, well settled as to what is a reasonable time to allow in giving a notice to quit. A reasonable notice to quit a yearly tenancy has for centuries, in legal construction, meant a six calendar months' notice,² terminating at the expiration of the current year:³ referring, when the tenant holds different portions of the premises from different days, to the day of entry on the substantial subject of the holding.⁴ The Agricultural Holdings (England) Act, 1883, provides that if a holding be either agricultural or pastoral, or both, or be wholly or in part cultivated as a market garden,⁵ a year's notice, "expiring with a year of tenancy," shall be necessary on every tenancy whether created before or after the commencement of that Act, unless the landlord and tenant shall have agreed *in writing* that this enactment shall not apply, in which case a six months' notice shall continue to be sufficient.⁶ A mortgagor occupying by arrangement with mortgagee, is entitled not only to compensation, but to six months' notice.⁷

§ 34A. So, again, a reasonable notice to terminate service is, by

¹ See to same effect judgment of Patteson, J., *id.*; and also the luminous judgment of Parke, B., *id.*

² That is, from one quarter day to the next but one following. The exact number of months or days does not signify. Notice on 26th March to quit on 29th September, insufficient. Notice on 28th September to quit on 23th March, sufficient. *Morgan v. Davies*, 1878.

³ *Doe v. Spence*, 1805 (Ld. Ellenborough). It has for the last thirty years been held in the County Courts that a week's notice to quit is necessary, but sufficient, to terminate a weekly tenancy. Such also is the Irish law. See *Harvey v. Copeland*, 1892. There appears to be no express decisions on the point, however, in the English Superior Courts. See, and compare, *Jones v. Mills*, 1861; *Huffell v. Armitstead*, 1835 (Parke, B.); and *Towne v. Campbell*, 1847. If the hiring be monthly, a month's notice, and if it be quarterly, a quarter's notice, will

apparently be necessary. *Towne v. Campbell*, 1847 (Coltman, J.). See also *Kenp v. Derrett*, 1814 (Ld. Ellenborough); *Right d. Flower v. Darby*, 1786 (Ld. Mansfield); *Bridges v. Potts*, 1864.

⁴ *Doe v. Snowdon*, 1769; *Doe v. Spence*, 1805; *Doe v. Watkins*, 1806; *Doe v. Rhodes*, 1843. In this last case the question raised, but not decided, was whether, where a tenant held a farm from year to year,—the land from 2 Feb., the house from 1 May,—a notice to quit the whole, given half a year before 2 Feb., was sufficient to entitle the landlord to recover the whole in ejectment, on a demise dated 3 Feb. The inclination of Ld. Abinger's opinion appears to have been towards the affirmative.

⁵ 46 & 47 V. c. 61, § 54. See also 39 & 40 V. c. 63, *lr.*, as to the corresponding law of Ireland.

⁶ 46 & 47 V. c. 61, § 33. See also § 41.

⁷ 53 & 54 V. c. 57, § 2.

law, in the case of domestic servants,—which term has been held to include huntsmen,¹ and head gardeners,²—a calendar month's warning.³ This rule is inapplicable to farm servants,⁴ clerks, travellers, governesses,⁵ housekeepers in large hotels,⁶ and the like.

§ 34B. So, the reasonable period during which a member of Parliament is entitled to freedom from arrest on civil process has, for at least two hundred years, been fixed by law at forty days before and after each session, the rule being the same in the case of a dissolution as in that of a prorogation.⁷

§ 35. Again, the reasonable time for which a party charged with an *indictable* offence may, in England or Ireland, be remanded is limited by statute to eight clear days, where the accused is remanded by warrant, or, in England, to three clear days, where he is remanded by verbal order.⁸ This rule does not apply where justices have power to deal *summarily* with a case which is also indictable. In such a case the remand may, by express enactment,⁹ be to “the next practicable sitting” of the Petty Sessions Court, though this may be more than eight days off. If, in any case not expressly provided for, the question arise whether a party has been remanded for a reasonable time, the statutory rule would doubtless be considered by the court as furnishing some guide. But, meanwhile, the jury would, no doubt, be called upon (as in the case of probable cause) to ascertain the existence of the facts, and to leave the court to determine, upon those facts, whether the time was reasonable or not.¹⁰ On three occasions, indeed—two in England,¹¹ and the other in Ireland¹²—the entire question appears to have been submitted to the jury. But the latter¹³ of the two English cases rested upon the authority of

¹ Nicoll v. Greaves, 1864.

² Nowlan v. Ablett, 1835.

³ Nowlan v. Ablett, 1835; Fawcett v. Cash, 1834.

⁴ Lilley v. Elwin, 1848.

⁵ Todd v. Kerrick, 1852. See post, § 177.

⁶ Lawler v. Linden, 1876 (Ir.).

⁷ Goudy v. Duncombe, 1847; In re Anglo-French Co-operative Soc., 1880; Re Armstrong, Exp. Lindsay, 1892.

⁸ 11 & 12 V. c. 42 (“The Indict-

able Offences Act, 1848”), § 21. See, as to the Irish law, 14 & 15 V. c. 93, § 14, Ir.

⁹ 42 & 43 V. c. 49, § 24, subs. 2.

¹⁰ Davis v. Capper, 1829.

¹¹ Davis v. Capper, 1829 (Gaselee, J.); Cave v. Mountain, 1840 (Ld. Abinger).

¹² Gillman v. Connor, 1840 (Ir.).

¹³ Cave v. Mountain, 1840 (Tindal, C.J.). Moreover, Ld. Abinger, who tried the cause, was, “under all the circumstances, satisfied with the ver-

the former, and in the former no objection was taken at Nisi Prius to the summing-up of the judge, though its correctness was questioned on a subsequent motion in Banc, and at the second trial the course suggested above was distinctly adopted.¹

§ 35A. Finally, the questions whether an arrest has been countermanded within a reasonable time,² or whether an executor has had reasonable time to remove the goods from the testator's mansion,³ are in each case for the judge.⁴

§ 36. While there are fixed rules of law as to what is a reasonable time for certain matters, the question appears to be, with respect to some others, governed by no precise rules, and to be purely a matter for a jury to determine. Thus it is for a jury to say whether a crop has been left on the ground for a reasonable time, so as to enable the tithe-owner to compare the tithe set out with the remainder of the produce;⁵ whether a copy of a rate has been delivered by an overseer to an inhabitant within such reasonable time as to satisfy the Act,⁶ which requires it to be given "forthwith" upon demand and tender of payment;⁷ whether the vendor of railway shares has offered to transfer them within a reasonable time;⁸ whether the owner of cattle, which have strayed on land through defect of the proprietor's fences, has removed them within a reasonable time;⁹ whether goods purchased by sample have been rejected,¹⁰ or goods taken by distress have been sold,¹¹ within a reasonable time; whether a foreign or inland bill of exchange payable at or after sight has been presented;¹² whether a blank stamped accept-

dict," so that the propriety of his leaving the question to the jury could not practically be questioned in the court above.

¹ *Davis v. Capper*, 1829.

² *Scheibel v. Fairbairn*, 1799, where Heath, J., held that a countermand ought to be made in the course of the day on which the debt was received.

³ *Co. Lit.* § 69, and p. 56 b.

⁴ In an action against a sheriff for escape under the old law, which is now no longer maintainable (50 & 51 V. c. 55 ("The Sheriffs Act, 1887"), § 16; and 40 & 41 V. c. 49, § 43, Ir.) the question whether his officer had or had not been guilty

of unreasonable delay in taking the party arrested to prison was likewise one for the judge: *Beaton v. Sutton*, 1797 (Heath, J.).

⁵ *Facey v. Hurdorn*, 1824.

⁶ 17 G. 2, c. 3 ("The Poor Rate Act, 1743"), § 2.

⁷ *Tennant v. Bell*, 1846.

⁸ *Stewart v. Cauty*, 1841.

⁹ *Goodwyn v. Cheveley*, 1859.

¹⁰ *Parker v. Palmer*, 1821.

¹¹ *Pitt v. Shew*, 1821.

¹² *Muilman v. D'Eguino*, 1795; *Fry v. Hill*, 1817. See, ante, § 30, ad fin. In determining this question, the jury should be directed to take into consideration the interests not only of the drawer, but of the

ance has been filled up by the holder;¹ whether a voyage insured has been commenced or prosecuted,² or whether costs have been taxed, within such time.³ The last-named questions, indeed, turn upon the ordinary course of business or trade, and are, consequently, matters with which the jury are peculiarly acquainted.

§ 37. Having now considered how questions of "reasonable time" are to be dealt with, when they are solely for the decision of the judge, and when they must be left to the jury, we next must consider how questions of *reasonable skill or care, due diligence, and gross negligence* are to be dealt with.

§ 37A. Now questions of the description just mentioned must, in the great majority of instances, be solely determined by the jury.⁴ The judges can rarely have materials which will enable them to decide such questions by rules of law. Thus, in actions against a surgeon for negligence in the treatment of patients,⁵ against gratuitous bailees for gross carelessness in losing property intrusted to them,⁶ and in like cases, even when the jury have found a verdict in opposition to the opinion of the presiding judge,

holder also. *Ramchurn Mullick v. Luckmeechund Radakissen*, 1854; *Mellish v. Rawdon*, 1832. See Chart. Merc. Bk. of India, &c. *v.* Dickson, 1871; and Van Dieman's Land Bk. *v.* Victoria Bk., 1871.

¹ *Temple v. Pullen*, 1853. The question of reasonable time does not arise when the bill is in the hands of a *bonâ fide* indorsee for value without notice. *Montague v. Perkins*, 1853.

² *Mount v. Larkins*, 1831; *Phillips v. Irving*, 1844, where it was said that "no certain or fixed time could be said to be a reasonable or unreasonable time for seeking a cargo in a foreign port; but that the time allowed must vary with the varying circumstances, which may render it more or less difficult to obtain such cargo." *Id.* (Tindal, C.J.).

³ *Burton v. Griffiths*, 1843.

⁴ In the *Metropol. Ry. Co. v. Jackson*, 1877, *Ld. Cairns, C.*, in *H. L.*, thus explained these principles:—"The judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have

to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that the separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury if, in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever." See, also, ante, § 22; *Bridges v. N. Lond. Ry. Co.*, 1874; *Robson v. N. East. Ry. Co.*, 1876, *C. A.*; *Rose v. N. East. Ry. Co.*, 1876, *C. A.*

⁵ *Doorman v. Jenkins*, 1834 (Taunton, J.).

⁶ *Doorman v. Jenkins*, 1834.

the court must generally refuse to grant a new trial.¹ In some cases, indeed, where the question relates to matters of legal practice, as, for instance, if a sheriff be charged with neglect of duty in not executing a writ, or if a solicitor be sued for negligence in conducting an action,² the judges would appear to be more competent than a jury to decide whether the facts proved amount to a want of reasonable care; but it seems that, even in such cases, the province of the judge is merely to inform the jury for what species or degree of negligence the defendant is answerable,³ and what duty in the particular case devolved upon him, by law, or practice; and, having done this, to leave the jury to decide, first, whether the defendant has performed his duty, and next, whether, in case of non-performance, the neglect was of that sort or degree which was venial or culpable in the sense of not sustaining or sustaining an action.⁴ The judges are, however, the proper parties to decide whether fines, customs, or services are reasonable,⁴ or whether deeds contain reasonable covenants or powers.⁵

§ 38. Questions of *bona fides*,⁶ *actual knowledge*,⁷ *express malice*,⁸ *real intention*,⁹ or *reasonable cause*, next require consideration. Generally speaking, all questions of this description belong absolutely to the jury. To this rule there are, however, some few exceptions. Thus, the law will sometimes *presume* the existence

¹ *Doorman v. Jenkins*, 1834, per Cur., commenting on and explaining *Shiells v. Blackburne*, 1789; *Moore v. Mourgue*, 1776.

² In *Godefroy v. Dalton*, 1830, the judges laid down, that in an action for negligence against him, a solicitor is, generally speaking, "liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause, as is usually and ordinarily allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in a higher branch of the profession of the law."

³ *Hunter v. Caldwell*, 1847 (Ld. Denman); *Reece v. Rigby*, 1821 (Abbott, C.J.); *Sherlock v. Passman*, 1836 (Alderson, B.).

⁴ Co. Lit. 56 b, 59 b; *Wilson v. Hoare*, 1839; *Bell v. Wardell*, 1740.

⁵ *Smith v. Doe d. Jersey*, 1819 (Abbott, C.J.).

⁶ See ante, § 29; and see also *Wedge v. Berkeley*, 1837; *Moore v. Mourgue*, 1776; *Gray v. Dinnen*, 1840 (Ir.); *Coxhead v. Richards*, 1846 (Cresswell, J.); *Haseldine v. Grove*, 1842; *Hughes v. Buckland*, 1846; *Horn v. Thornborough*, 1849; *Douglas v. Ewing*, 1857 (Ir.).

⁷ *Harratt v. Wise*, 1830.

⁸ As in actions for malicious prosecution or arrest. *Mitchell v. Jenkins*, 1833.

⁹ *Doe v. Wilson*, 1809; *Powis v. Smith*, 1822; *Doe v. Batten*, 1775; *Zouch v. Willingale*, 1790 (Gould and Wilson, JJ.); *Cox v. Reid*, 1849.

of fraud, knowledge, malice, intention, or justification, from the proof of other remote facts,¹ and whenever these presumptions are embodied in rules of law, the court will either draw the inference without the aid of a jury, or the jury will be bound to follow the directions of the judge. Moreover, in some particular cases the decision of questions of *bona fides*, *reasonable cause*, &c., actually belongs to the judge. For example, in cases where by law notice of action is still required,² the judge has to decide whether notice of action is necessary, and consequently the question of *bona fides* must be determined by him, and not by the jury;³ and, on an application at *Nisi Prius* for an amendment, it is the duty of the judge to determine, as a matter of fact, from the pleadings and the evidence, what is the real question in controversy between the parties.⁴ Again, questions of *discretion*, or of *good cause*, in connection with costs, are for the decision of the judge. Thus, where, in an action in the High Court, the plaintiff in an action of contract recovers (except by summary judgment under R. S. C., Ord. XIV.) a sum not over 20*l.*, or between 20*l.* and 50*l.*, or in an action of tort recovers not over 10*l.*, or between 10*l.* and 20*l.*, he is, in each case, not entitled in the first event to any costs, or in the other, to more than County Court costs, unless the judge certify that there was *sufficient reason* for bringing the action to the High Court, subject, indeed, to a power in the High Court or at Chambers to allow costs.⁵

§ 39. The judge's discretion must, however, be exercised subject to a rule⁶ which provides that—"Subject to the provisions of the Acts⁷ and these Rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge: Provided

¹ See Chap. "On Presumptive Evidence," post.

² In many cases it is not now required, but defendant must instead be given an opportunity of tendering amends. See post, § 73, at p. 72.

³ *Kirby v. Simpson*, 1854; *Arnold v. Hamel*, 1854.

⁴ *Wilkin v. Reed*, 1854.

⁵ See § 116 of "The County Courts Act, 1888" (51 & 52 V. c. 43). Whether for the purpose an action

of detainee is one of tort or of contract depends on the facts of the particular case. *Bryant v. Herbert*, 1877, C. A.; R. S. C. 1883, Ord. LXV. r. 12; *Pitt-Lewis' County Court Practice*, vol. i. p. 110.

⁶ R. S. C. 1883, Ord. LXV. r. 1.

⁷ These are "The Sup. Ct. of Judic. Acts, 1873 to 1879, and 1881," and "The App. Jurisd. Act, 1876." See Ord. LXXI. r. 1.

that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund, to which he would be entitled according to the rules hitherto acted upon in the Chancery Division: Provided also that, where any action, cause, matter, or issue is tried with a *jury*, the *costs shall follow the event*, unless the judge by whom such action, cause, matter, or issue is tried, or the court, shall, for *good cause*, otherwise order.”¹

§ 39A. Under the above Rule, when a cause is tried with a jury, the presiding judge may “*for good cause*” deprive a successful litigant of costs, either on an application being made to him for that purpose, or of his own motion.² An application to the judge for this purpose should be made either during the trial, or within a reasonable time after its termination;³ and an application to the court must—to be successful—be made without undue delay, but may be entertained by the court, whether a previous application to the judge who tried the cause has or has not been made.⁴ In no case will either the judge or the court deprive the successful litigant of his costs unless for good cause.⁵ The judge, in exercising his discretion, *must assume the truth of the facts found by the jury*, but is not confined to the consideration of the party’s conduct in the course of the litigation, and may consider such of his previous acts as have conduced to the action.⁶ In an action in which the defendant succeeds, he ought not to be deprived of costs in the Queen’s Bench Division, simply because such a result would have followed in the old Court of Admiralty.⁷ To ascertain

¹ Quære, Does this Rule extend to the Liverpool Passage Court? See *King v. Hawksworth*, 1879; and 36 & 37 V. c. 66, § 91.

² *Turner v. Heyland*, 1879; *Collins v. Welch*, 1879; *Marsden v. Lanc. & York. Ry. Co.*, 1881, C. A.

³ See *Kynaston v. Mackinden*, 1870, C. A.

⁴ See *Myers v. Defries*, and *Siddons v. Lawrence*, 1879, C. A.; *Bowey v. Bell*, 1878; *Gen. St. Nav. Co. v. Lond. & Ed. Ship. Co.*, 1877.

⁵ Everything which increases the litigation and the costs, and which places upon the defendant a burthen which he ought not to bear in the

course of that litigation, is “good cause for depriving plaintiff of his costs.” *Huxley v. East London Ry. Co.*, 1889 (*Ld. Halsbury, L.C.*).

⁶ *Harnett v. Vise*, 1880, C. A. In *Jones v. Curling*, 1884, C. A., it was held, 1st, that the facts must show that it would be more just to disallow than to allow the costs, as, for instance, that there has been oppression or misconduct on the part of the successful litigant; 2nd, that the question of costs is one respecting which an appeal will lie.

⁷ *Gen. St. Nav. Co. v. Lond. & Ed. Ship. Co.*, 1877.

whether there is or is not "good cause" the judge may not look at communications made "without prejudice."¹

§ 39B. Attempts to determine the "*event*," which, in the absence of a special order, costs are to "follow," have given rise to much controversy.² In a general way it means the result of all the proceedings incidental to the litigation; so that among the costs which follow it will be included the costs of all stages of that litigation,—for example, the costs of a first trial when a second has been ordered.³ When a plaintiff has united several independent causes of action, and has succeeded on some of the issues, and failed on the others, the term "event" is to be read distributively, and the plaintiff will have only the general costs of the cause, while the defendant will get the costs of those issues on which he succeeds,⁴ although the fact of the great majority of the issues being found for the defendant *may* be "good cause" for depriving plaintiff of the general costs of the cause.⁵

§ 40. Questions as to the construction of written documents must next be discussed. Matters of great nicety arise in connection with this subject. But the clear general rule is that the construction of all written documents is for the court alone. The construction of these is, as we have said, for the court alone so soon as the true *meaning of the words*⁶ in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury;⁷ and it is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained;⁸ or conditionally, when those words or circumstances are necessarily referred to them. The term "written documents" includes Acts of Parliament, judicial records, deeds, wills, negotiable instruments, agree-

¹ Walker v. Wiltshire, 1889, C. A.

² See Collins v. Welch, 1879, C. A. (Bramwell, L.J.); and Myers v. Defries, 1879.

³ Field v. Gt. North. Ry. Co., 1878; Harris v. Petherick, 1879, C. A.; Green v. Wright, 1877, C. A.

⁴ Myers v. Defries, 1880, C. A.; Ellis v. Desilva, 1881, C. A.; Sparrow v. Hill, 1881.

⁵ Forster v. Farquhar, 1893.

⁶ See Ashforth v. Redford, 1873; Alexander v. Vanderzee, 1872. But see Bowes v. Shand, 1877, affirming Shand v. Bowes, 1876.

⁷ See Tamvaco v. Lucas, 1862; Lyle v. Richards, 1866; D. of Devonshire v. Neill (Ir.), 1877 (Palles, C.B.).

⁸ Key v. Cotesworth, 1852. See, also, Lang v. Smith, 1838, as to mercantile usage.

ments, and letters. A misconstruction by the court is the proper subject of appeal to a court of error; but a misconstruction by the jury cannot in any way be effectually set right.¹ The effect of the rule consequently is to render the law certain. A marked instance of its application occurs in the case of the construction of the specification of a patent, for though the interpretation of such an instrument,—relating as it does to matters of science and skill,—would seem peculiarly adapted to the practical information of jurors, the court must construe it² after merely ascertaining from the jury an explanation of technical terms.³ Again, the construction of all written contracts is for the court. Where a contract for the sale of barley was in letters, one of which offered *good* barley, and the other accepted the offer, “expecting you will give us *fine* barley and good weight,” it was held, that the jury (though they might be asked as to the mercantile meaning of the words “good” and “fine”), after having found that there was a distinction between the two terms employed, could not further decide that the parties did not misunderstand each other, but that they were bound to take the interpretation of the contract, as a matter of law, from the judge.⁴ So, too, it is for the court to decide, as matter of law, whether the sum mentioned in an agreement as to be

¹ Judgment in *Neilson v. Harford*, 1841.

² *Neilson v. Harford*, 1841; *Bovill v. Pimm*, 1856. These cases virtually overrule *Hill v. Thompson*, 1817, where *Ld. Eldon* observed, that the *intelligibility of the description* of a specification was a matter of fact. In America the sufficiency of the description in a specification is still left as a question of fact to be determined by the jury, unless the statement be obviously too vague. *Wood v. Underhill* (Am.), 1847. But in England, where in a patent cause the want of novelty appears distinctly from documents, such, for instance, as a prior patent and specification, the judge, and not the jury, must notice the identity of the two supposed inventions, and the consequent want of novelty in the second. *Bush v. Fox*, 1856; *Booth v. Kennard*, 1858; *Hills v. London Gaslight Co.*,

1860; *Betts v. Menzies*, 1859. See, too, *Betts v. Menzies*, 1862, H. L.; and *Seed v. Higgins*, 1860, H. L. But see also the observations of *Ld. Westbury, C.*, on *Bush v. Fox*, 1856, and the law supposed to be there laid down, in *Hills v. Evans*, 1862.

³ *Hills v. Evans*, 1862.

⁴ *Hutchison v. Bowker*, 1839, where *Parke, B.*, observed, “It is the duty of the court to construe all written instruments; if there are peculiar expressions used in it, which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what the *meaning of those expressions* was, but for the court to decide what the *meaning of the contract* was.” See also *Bourne v. Gatlife*, 1841; *Griffiths v. Rigby*, 1856; *Hills v. London Gaslight Co.*, 1858; *Kirkland v. Nisbet*, 1859; *Montgomery v. Middleton*, 1862.

paid for a breach thereof¹ is a penalty or liquidated damages;² whether a letter containing no words of doubtful trade meaning, and as to which the extrinsic facts are not in controversy, amounts to a guarantee;³ or whether⁴ a written acknowledgment of a debt,⁵ or of title,⁶ is sufficient to take the case out of the statutes of limitation. On this last subject it will indeed, in a doubtful case, be prudent for the judge both to express his own opinion, and also to take the opinion of the jury.⁷ Moreover, whenever a document is connected with other evidence affecting its construction, the whole must be submitted to the jury together.⁸

§ 41. Letters, as mentioned in the preceding section, fall within the general rule as to "written documents."⁹ Their construction, consequently, unless, indeed, extrinsic circumstances be capable of explaining them, is for the court, no matter how ambiguous the language in which they are couched.¹⁰ If, however, letters be written in so dubious a manner as to bear different constructions, but can be explained by other transactions, the jury (who are clearly the judges of the truth or falsehood of such collateral facts which may vary the sense of the letters themselves) must decide upon the whole evidence.¹¹ Accordingly, on a question whether the defendant had adopted the acceptance of a bill, the construction of a letter written by him on the subject, taken in connection with his subsequent conduct, was held to be entirely for the jury.¹² Whenever, too, a contract has to be made out partly by letters, and partly by parol evidence, the jury must deal with the whole question.¹³ If a document be lost, and oral evidence be given of its contents, the judge must construe its meaning in the same manner as if it had been produced, but here again the jury may be asked if they

¹ See *Wallis v. Smith*, 1882.

² *Sainter v. Ferguson*, 1849 (Wilde, C.J.). Formerly this was occasionally left to the jury. See *Crisdee v. Bolton*, 1827 (Best, C.J.).

³ *Bk. of Montreal v. Munster Bk.*, 1876.

⁴ See, contra, *Lloyd v. Maund*, 1788; *Linsell v. Bonner*, 1835.

⁵ *Morrell v. Frith*, 1838; *Routledge v. Ramsay*, 1838 (Ld. Denman).

⁶ *Doe v. Edmonds*, 1840 (Parke, B.).

⁷ *Bucket v. Church*, 1840 (Parke,

B.); *Morrell v. Frith*, 1838 (id.).

⁸ *Routledge v. Ramsay*, 1838 (Ld. Denman); *Morrell v. Frith* 1838; *Moore v. Garwood*, 1849; *Ashpitel v. Sercombe*, 1850; *Foster v. Mentor Life Ass. Co.*, 1854.

⁹ *Berwick v. Horsfall*, 1858.

¹⁰ *Furness v. Meek*, 1862.

¹¹ *Macbeath v. Haldimand*, 1786 (Buller, J.); *Smith v. Thompson*, 1849. See *Lyle v. Richards*, 1867.

¹² *Wilkinson v. Storey*, 1839. See *Brook v. Hook*, 1871.

¹³ *Bolckow v. Seymour*, 1864.

believe oral evidence which has been given as to the circumstances of the alleged loss.¹

§ 42. An exception to the general rule of law which intrusts the judge with the construction of all written documents arises where the writing forms the subject of an indictment or an action, and the guilt or innocence of the defendant depends upon the popular meaning of the language employed. Thus, the legislature, after much discussion,² has expressly determined³ that, on a prosecution for *libel*, the question whether the particular publication is a libel or not, shall always be entirely for the jury. Even here the judge may, as a matter of advice to them, give his own opinion respecting the nature of the publication, though he is not in point of law bound to do so.⁴ The statute here referred to is in strictness only applicable to criminal trials, but as it is a declaratory Act, its provisions have in practice been adopted in civil actions for libel, and it has now for a series of years been the course for the judge,—who still has to decide whether the words complained of are reasonably *capable* of bearing the defa-

¹ *Berwick v. Horsfall*, 1858.

² As to this celebrated dispute, in support of the claims of the judges, see *R. v. Udall*, 1590; *R. v. Woodfall*, 1770 (Ld. Mansfield); *R. v. Dean of St. Asaph*, 1783 (Ld. Mansfield); and in support of the rights of the jury, *R. v. Tutchin*, 1704 (Ld. Holt); *R. v. Owen*, 1752; *R. v. Dean of St. Asaph*, 1783 (Willes, J., and Ld. Ellenborough). As to the proceedings in the House of Lords on the passing of "The Libel Act" (32 G. 3, c. 60), see 22 How. St. Tr. 294, 297.

³ 32 G. 3, c. 60 (commonly called "Fox's Libel Act"), declares and enacts (§ 1) that, on every trial of an indictment or information for a libel, "the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed by the court or judge,

before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information." § 2 provides, that, "on every such trial, the court or judge, before whom such indictment or information shall be tried, *shall*,* according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the King and the defendant or defendants as in other criminal cases." § 3 provides that a jury may find a special verdict; and § 4 reserves to defendants a right to move in arrest of judgment.

⁴ Per Parke, B., in *Parmiter v. Coupland*, 1840.

* It has been said that the word "shall" should here be interpreted as if the word "may" had been used. *Baylis v. Lawrence*, 1840 (Littledale, J.).

matory meaning ascribed to them by the plaintiff,¹—to first give a legal definition of the offence, and then leave the jury to determine whether the writing complained of falls within that definition or not.² It is, indeed, not absolutely necessary that the judge should explain what constitutes a libel, but he may leave the whole question without reserve to the jury.³ If, however, they find a verdict against the defendant, either on an indictment or an action, the court will arrest the judgment, where the writing on the face of it is not libellous.⁴

§ 43. The respective duties of the judge and jury on indictments for writing threatening letters⁵ are not very clearly defined. In some cases the jury have been permitted, upon examination of the paper, to decide for themselves whether or not it contained a menace.⁶ In other cases, the question appears to have been exclusively determined by the court;⁷ while on a few occasions the opinion of the jury, and of the judge, have been both alternatively taken.⁸ On a question as to the construction of a writing written by defendant and alleged to be libellous, other libels by the defendant are admissible⁹ both as to construction and to show malice.¹⁰

§ 44. In connection with the subject of libel, it should be mentioned that it is a question of law for the court whether a *communication* be *privileged* or not. If, indeed, the privilege claimed be of a character that it is on public grounds regarded as *absolute*,¹¹ the jury must first determine what the circumstances were under which the communication was made, and also whether such communication was made *bonâ fide*. They ought to find *bona fides* unless the evidence be sufficient to raise a probability that the communication was colourably made.¹² After they have found the facts and deter-

¹ Hunt v. Goodlake, 1873; Sturt v. Blagg, 1847 (Wilde, C.J.).

² Parmiter v. Coupland, 1840.

³ Baylis v. Lawrence, 1841.

⁴ Hearne v. Stowell, 1840; Goldstein v. Foss, 1827; Parmiter v. Coupland, 1840 (Alderson, B.).

⁵ As to which, see 24 & 25 V. c. 96 ("The Larceny Act, 1861"), §§ 44, 46.

⁶ R. v. Girdwood, 1770.

⁷ R. v. Smith, 1849; R. v. Pickford, 1830.

⁸ R. v. Robinson, 1796; R. v. Coady,

1882.

⁹ Bolton v. O'Brien, 1885.

¹⁰ Barrett v. Long, 1851, H. L. Though the jury are usually cautioned not to give damages for them, the omission of such caution is not a misdirection. Darby v. Ouseley, 1856.

¹¹ As to such absolute privilege, see Dawkins v. Paulet, 1869; and Dawkins v. Ld. Rokeby, 1873.

¹² Taylor v. Hawkins, 1851; Somerville v. Hawkins, 1851.

mined the question of *bona fides*, the judge must decide, as a question of law, whether the occasion of the publication was such as to rebut the inference of malice.¹ If, however, any doubt exist as to whether or not the defendant in some respects exceeded the limits of his privilege, and made comments, which may be evidence of *actual* malice, the opinion of the jury must be taken upon the effect of such evidence.²

§ 45. On an indictment for perjury, it is still a moot point whether the materiality of the matter in which the false swearing is proved, is a question of fact for the jury, or a question of law for the judge. According to the better opinion, it ought to be regarded in the latter light.³

§ 45A. All questions of mere fact are for the decision of a jury, unaided by any positive legal rules—it being the duty of the judge merely to take care that they are not misled by anything coming out in the evidence.⁴ Questions of this description are as to permissive occupation;⁵ the assent of an executor to a bequest;⁶ the unsoundness of a horse;⁷ the delivery of a document as an escrow, unless the question turn solely on the construction of writings;⁸ the infringement of a patent,⁹ where such infringement does not depend merely on the construction of the specification;¹⁰ the novelty of a design, within the meaning of the Acts relating to copyright of design for articles of manufacture;¹¹ the existence of a nuisance, as caused by erecting a bridge or weir in a navigable stream;¹² the definition of the word “street,”¹³ except in certain cases where the term has been employed in an Act of Parliament;¹⁴ the seaworthi-

¹ *Coxhead v. Richards*, 1846 (Cresswell, J.; Coltman, J.); *Stace v. Griffith*, 1869.

² *Cooke v. Wildes*, 1855.

³ See and compare *R. v. Courtney*, 1856 (Ir.); *R. v. Lavey*, 1850; *R. v. Dunstan*, 1824.

⁴ Per *Ld. Abinger*, in *Mackintosh v. Marshall*, 1843.

⁵ *Lessee of Phayre v. Fahy*, 1832 (Ir.); *Jones v. Boland*, 1840 (Ir.); but see *Whiteacre v. Symonds*, 1808.

⁶ *Mason v. Farnell*, 1844, even though “the question depends upon the careful and somewhat critical comparison of the terms of a deed with the other circumstances and

facts of the case.” Per *Alderson, B.*, pronouncing the judgment of the court. See, also, *Elliott v. Elliott*, 1841 (*Ld. Abinger.*).

⁷ See per *Patteson, J.*, in *Baylis v. Lawrence*, 1840.

⁸ *Furness v. Meek*, 1858, *H. L.* See ante, § 41, post, § 1834.

⁹ *De la Rue v. Dickenson*, 1857; *Lister v. Leather*, 1858.

¹⁰ *Seed v. Higgins*, 1860, *H. L.* See post, § 43.

¹¹ *Harrison v. Taylor*, 1860.

¹² *R. v. Betts*, 1850; *R. v. Russell*, 1827; *R. v. Ward*, 1836.

¹³ *R. v. Fullford*, 1861.

¹⁴ *Robinson v. Local Board of Bar-*

ness of a ship;¹ the construction of a policy of insurance, shown by evidence to contain a latent ambiguity;² the materiality of facts not communicated in effecting an insurance;³ the competency of a testator in a will cause, and his freedom from undue influence;⁴ the cruelty of a husband as a ground for judicial separation;⁵ the condonation of a conjugal offence;⁶ whether there has been an acceptance of goods sufficient to satisfy the Statute of Frauds;⁷ whether a tender be absolute or conditional.⁸ The court, however, in the last-named case, should be mindful to point out that a tender is not invalid in law as being conditional, if it merely implies that the debtor admits no more to be due, but that to make it bad it must go further, and imply that the creditor, if he takes the sum offered, will admit that his entire claim is satisfied.⁹ The jury have also, in any question relating to the amount of interest payable on a foreign bill of exchange, to determine as facts, first, what rate of interest is usually paid at the respective places where the bill was drawn or indorsed or accepted, and next, whether the plaintiff has sustained any damage requiring the payment of interest at all; but the judge will decide as a pure question of law, whether the case is to be governed *lege loci contractus*, or *lege loci solutionis*¹⁰

§ 46. Among other matters of fact it is for a jury to decide whether articles supplied to an infant be *necessaries*: but, as to this, their decision is *subject to the control* of the judges,¹¹ who have laid down general rules of law, as follow: first, the question whether articles are necessaries or not does not, in any degree, depend upon what allowance the infant may have received from his father, and may have misapplied;¹² secondly, the articles must be *really useful*,

ton, 1882; *Maude v. Baildon Local Board*, 1883.

¹ *Clifford v. Hunter*, 1827 (Ld. Tenterden).

² *Hordern v. Commercial Union, &c.*, 1887.

³ *Rawlings v. Desborough*, 1840 (Ld. Denman).

⁴ *Purdon v. Ld. Longford*, 1877 (Ir.).

⁵ *Tomkins v. Tomkins*, 1859.

⁶ *Peacock v. Peacock*, 1859.

⁷ *Lillywhite v. Devereux*, 1846; *Alderson, B.*, recognising *Edan v. Dudfield*, 1841; *Clark v. Wright*, 1860 (Ir.).

⁸ *Eckstein v. Reynolds*, 1837; *Marsden v. Goode*, 1845.

⁹ *Bowen v. Owen*, 1847; *Bull v. Parker*, 1843; *Henwood v. Oliver*, 1841.

¹⁰ *Gibbs v. Fremont*, 1853. See further on this subject, post, § 47.

¹¹ *Harrison v. Fane*, 1840 (Tindal, C.J.); *Ryder v. Wombwell*, 1868.

¹² *Burghart v. Hall*, 1839; *Peters v. Fleming*, 1840. But see *Barnes v. Toye*, 1884, where it was held that, on a question of necessaries, an infant might prove that at the date of the sale he was sufficiently supplied with other similar goods.

and therefore merely ornamental jewellery,¹ or luxurious confectionery,² cannot be necessities; and, thirdly, articles, even if useful, must be such as would be necessary and suitable to the degree and station in life of the infant.³ The judge determines whether the articles are *capable* of being necessities, regard being had to the position of the defendant; and if he decide this in the affirmative, the jury say whether, under the circumstances, they actually were necessities or not.⁴ Funeral expenses incurred on her husband's death by an infant widow;⁵ legal expenses incurred by an infant bride on marriage,⁶ and a gold watch and chain for an undergraduate,⁷ are all capable of being "necessaries." But a pair of jewelled solitaires and a silver-gilt goblet cannot be "necessaries."⁸ And in a case where the jury, in opposition to the opinion of the judge, found that the hiring of horses and gigs were "necessaries" for an Oxford undergraduate, who was the younger son of a man of fortune, but kept a horse of his own, the court set aside the verdict as perverse, and granted a new trial;⁹ the same course was pursued, where an Irish jury had found that a hunter was "necessary" for a mere boy.⁹

§ 47. Questions as to the meaning of particular expressions have already been seen to be in all criminal cases—and this even when they are in writing—entirely for the jury.¹⁰ Speaking generally, it may be said that the meaning of expressions is in most cases to be determined by a jury. The power of a jury to interpret expressions is not confined merely to such as are employed in contracts, or have a peculiar commercial meaning. It extends to all phrases, capable of being used in a technical sense, which do not require any knowledge of the law to explain them. Accordingly, the courts have more than once refused to entertain the question, whether an excavation is or is not a mine,¹¹ and as such not rate-

¹ *Ryder v. Wombwell*, 1868, *supra*.
² *Brooker v. Scott*, 1843; *Wharton v. Mackenzie*, 1844, and *Cripps v. Hills*, 1844.

³ *Peters v. Fleming*, 1840.

⁴ See *Skrine v. Gordon* (Ir.) *infra*, and *Cripps v. Hills*, 1844, *supra*.

⁵ *Chapple v. Cooper*, 1844.

⁶ *Helps v. Clayton*, 1864.

⁷ *Peters v. Fleming*, 1840.

⁸ *Harrison v. Fane*, 1840.

⁹ *Skrine v. Gordon*, 1875 (Ir.); so in *Wharton v. Mackenzie*, 1844, and *Cripps v. Hills*, 1844, where juries decided that wine parties and suppers were necessities for undergraduates.

¹⁰ *Ante*, § 42.

¹¹ Any question as to whether a mine is a mine within the meaning of the Mining Acts "shall be referred to a Secretary of State, whose decision thereon shall be final." 50 & 51

able to the relief of the poor, and have left the Sessions to apply to the question, as one of fact, the information they possess, and their knowledge of the English language,' declining to lay down any legal principle, except that the method of working is to be considered, and not the chemical or geological character of the produce.² It also is exclusively for a jury to say whether what is proved to have taken place is or is not "a representation" of a dramatic work, so as to subject the person representing it to penalties under the Act of 3 & 4 W. 4, c. 15 ("The Dramatic Copyright Act, 1833").³ If, however, a word of doubtful import be used in an Act of Parliament, its general meaning ought to be explained to the jury by the judge; and accordingly where, on the trial of an issue whether a railway was passing through "a town," within the meaning of the Railway Clauses Consolidation Act, the judge merely told the jury that the word "town" was to be understood in its ordinary and popular sense, the omission to give them any further instruction was held to constitute a misdirection, and a new trial was granted.⁴ But the inspection of a record is a matter within the peculiar province of the court; and a jury will not be allowed to examine a record, for the purpose of giving their opinion as to what word has been written above an erasure.⁵

§ 48. Questions as to whether a *foreign* law, &c. exists or not are, as we have already seen,⁶ entirely matters to be *found as facts* by a jury. Foreign⁷ laws, usages and customs cannot be judicially noticed, but must be proved as facts in each particular case,⁸ and found by the jury. In such cases, the abstract *meaning* as well as the *existence* of the law must, in general, be determined by the jury

V. c. 58, § 71; and 35 & 36 V. c. 77, § 39.

¹ *R. v. Sedgely*, 1831; *R. v. Brettell*, 1832; *R. v. Dunsford*, 1835. "The Court of Quarter Sessions are judges of law and fact. The appeal to the Queen's Bench is confined to questions of law. The distinction, therefore, between the respective provinces of the two courts is so far analogous to the distinction under discussion as to justify the drawing of illustrations from cases of appeal."

² See *Darvill v. Roper*, 1855; *Bell v. Wilson*, 1866; *Dow. Duch. of Cleveland v. Meyrick*, 1868 (*Malins, V.-C.*). But see *Jones v. Cwmorthen Slate Co.*, 1879. See, also, *Midl. Ry.*

Co. v. Haunchwood Brick and Tile Co., 1882.

³ *Planche v. Braham*, 1837.

⁴ *Elliott v. South Devon Ry. Co.*, 1848.

⁵ *R. v. Hucks*, 1816 (*Ld. Ellenborough*).

⁶ *Ante*, § 5.

⁷ As to *colonial laws*, see *ante*, § 9.

⁸ Although a point of foreign law may have been proved and acted upon in one court, another court will not rely upon the report of such a case, but will require fresh proof of the law, as a matter of fact, on each particular occasion: *M'Cormick v. Garnett*, 1854 (*Knight-Bruce, L.J.*).

on the testimony of the skilled witnesses.¹ It is, however, the duty of the court to decide, first, as to the competent knowledge of the witnesses called;² next, as to the admissibility of the documents by which they seek to refresh their memory; and lastly,³ as to the special applicability of the law, when proved, to the particular matter in controversy.⁴ Even where the admissibility or inadmissibility of certain evidence depends on its *existence or interpretation*, proof of a foreign law should exclusively be addressed to the court, just as in other cases where a question respecting the admissibility of evidence rests upon disputed facts.⁵ Perhaps, indeed, as the object of the proof of foreign law is to enable the court to instruct the jury respecting its bearing on the case in hand, it will always be advisable for the judge to assist the jury in ascertaining what the law really is.⁶

§ 49. Before leaving the subject of foreign law, it must be pointed out that the rules of evidence adopted in one country,—whether established by the practice of its courts, or enacted by its legislature,—will not regulate the proceedings of courts in another country, when transactions in the first-named country become the subject of investigation in the latter.⁷ The *lex fori* governs every court upon all questions of evidence. Such questions as whether a witness is competent or not; whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not, must be determined, not *lege loci contractus*, but by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it.⁸ Thus, where (before the Evidence Amendment Act of 1851⁹) the assignees of an English bankrupt sued in Calcutta, the bankruptcy and the assignment could not be proved in the Calcutta court by producing copies of the proceedings in the Bankruptcy Court, purporting to bear the seal of that court, and to be signed

¹ *R. v. Picton*, 1806.

² *Bristow v. Sequeville*, 1850. The whole of this subject will be discussed, post, §§ 1423—1425.

³ See *Sussex Peer. case*, 1844; *Ld. Nelson v. Ld. Bridport*, 1844.

⁴ *Story, Conf. (Am.)*, § 638.

⁵ *Trasher v. Everhart*, 1831 (Am.); *Story, Conf. (Am.)*, § 638, n. 3, ante, § 23.

⁶ See *Story, Conf. (Am.)*, § 638; *Mostyn v. Fabrigas*, 1774 (Ld. Mansfield); *Disora v. Phillips*, 1863.

⁷ *Clark v. Mullick*, 1840 (Ld. Brougham), *infra*.

⁸ *Bain v. Whitehaven, &c. Junc. Ry. Co.*, 1850 (Ld. Brougham) (H. L.).

⁹ 14 & 15 V. c. 99, §§ 11 and 19.

by the Clerk of Enrolments, for such evidence, although sufficient in English courts of justice, was not then admissible in India.¹ Again, although by Scotch law, all instruments prepared and witnessed according to the provisions of the Scotch Act of 1681 are probative writs, and may be given in evidence in a Scotch court without any proof, in an English court, the mere production of such a Scotch instrument would not suffice, but it would be necessary to call one or other of the attesting witnesses.² A copy of a charter-party which has been verified in accordance with the law of the place where it was entered into, cannot on that account be received in an English court, but is inadmissible there.³ Several other cases might be cited to the same effect;⁴ and in all, the distinction is recognised between *the cause of action*, which must be judged of according to the law of the country where it originated, and the *mode of proceeding*, including of course the rules of evidence, which must be adopted as it happens to exist in the country where the action is brought.⁵

§ 49A. English courts-martial held abroad are expressly excepted from the general rule that the *lex fori* governs the laws of evidence. For the Army Act, 1881,⁶ enacts, first, that “a court-martial under this Act shall not, as respects the conduct of its proceedings, or the reception or rejection of evidence, or as respects any other matter or thing whatsoever, be subject to the provisions of the Indian Evidence Act, 1872, or to any Act, law, or ordinance of any legislature whatsoever, other than the Parliament of the United Kingdom;” and next, that “the rules of evidence to be adopted in proceedings before courts-martial shall be the same as those which are followed in civil courts in England; and no person shall be required to answer any question or to produce any documents, which he could not be required to answer or produce in similar proceedings before a civil court.”

¹ Clark v. Mullick, 1840.

² Yates v. Thomson, 1835 (Ld. Brougham).

³ Brown v. Thornton, 1837.

⁴ Trimby v. Vignier, 1834; Huber v. Steiner, 1835; British Linen Co. v. Drummond, 1830; Appleton v. Ld. Braybrook, 1816; Black v. Bray-

brook, 1816; Don v. Lippmann, 1837; Leroux v. Brown, 1852; Finlay v. Finlay, 1852.

⁶ Mostyn v. Fabrigas, 1774. See also Story, Conf. (Am.), §§ 556 et seq. and 629—636.

⁶ 44 & 45 V. c. 58, §§ 127 and 128.

AMERICAN NOTES.

Law and Fact. — The line of distinction between matter of law and matter of fact by no means follows the same lines as the division of judicial functions between the court and the jury. The action of the jury is confined to deciding such facts as are involved in the issue raised by the pleadings in the case, or by the nature of the particular investigation. These are what may be called the ultimate facts. It is to such facts alone that the evidence submitted to the jury is limited. *State v. Hodge*, 50 N. H. 510, 522 (1869). Various dicta, indeed, speak of a wider power on the part of the jury. Thus Judge Story, in denying the right of the jury to judge of the law in criminal causes, says: "I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law." *U. S. v. Battiste*, 2 Sumn. 240 (1835); *Townsend v. State*, 2 Blackf. 151 (1828). That it is the duty of the jury, even in criminal cases, to take the law from the court, see *Robbins v. State*, 8 Oh. St. 131 (1857); *Duffy v. People*, 26 N. Y. 588 (1863); *Com. v. Anthes*, 5 Gray, 185 (1855); *Battre v. State*, 18 Ala. 119 (1850); *Pierce v. State*, 13 N. H. 536 (1843); *Hardy v. State*, 7 Mo. 607 (1842); *Townsend v. State*, 2 Blackf. 151 (1828); *State v. Hodge*, 50 N. H. 521 (1869). "The jury are not judges of the law in any case, civil or criminal. Neither at common law, nor under the constitution of Pennsylvania, is the determination of the law any part of their duty or their right." *Com. v. McManus*, 143 Pa. St. 64, 86 (1891); *Higginbotham v. Campbell*, 85 Ga. 638 (1890). Counsel can address the jury on all questions of law within the issue. *Com. v. Porter*, 10 Metc. 263 (1845). Under these decisions all questions of domestic law are for the court; some questions of fact are for the jury.

To the contrary, see *State v. Croteau*, 23 Vt. 14 (1849); *State v. Jurche*, 17 La. Ann. 71 (1865); *Nelson v. State*, 2 Swan (Tenn.), 482 (1852); *State v. Snow*, 18 Me. 346 (1841); *Montee v. Com.*, 3 J. J. Marsh. 132, 151 (1830).

CONSTRUCTION OF WRITINGS. — Though construction of written documents is in most cases merely attempting to ascertain a fact, viz., the intention set forth in it, the duty of construction is a function of the court. In *Hamilton v. Liverpool, &c. Ins. Co.*, 136 U. S. 242 (1889), it is said that "the construction of the correspondence in writing between the parties," presents "a pure question of law." The same phrase is employed in *Allen v. Frost*, 62 Ga. 659 (1879). Probably the rule had its inception in the fact that in early days juries could not read. It owes its continuance to reasons

of policy and convenience. *Morse v. Weymouth*, 28 Vt. 824 (1856); *Allen v. Frost*, 62 Ga. 659 (1879); *R. R. Co. v. McKenna*, 13 Lea, 280 (1884); *Jones v. Swearingen*, 42 S. C. 58, 67 (1894); *Lindsay v. Hamburg, &c. Ins. Co.*, 115 N. C. 212 (1894).

“Where a contract is oral, the question what the contract is must, if controverted, be tried by the jury as a question of fact; but where the terms of a contract are undisputed, its construction and effect, where the contract is oral as well as where it is written, are to be determined by the court.” *Globe Works v. Wright*, 106 Mass. 207 (1870). This duty of construction may, at times, principally involve a question of the meaning of words, of which the court takes judicial cognisance; *e. g.*, whether the term “Congregational persuasion” means theological doctrine, or merely church government, so as to embrace a “Unitarian clergyman.” *Atty.-Gen. v. Dublin*, 38 N. H. 459 (1859). The court may be aided by experts in reading a document, *e. g.*, railroad orders. *R. R. v. McKenna*, 13 Lea, 280 (1884). It is error to submit the question of the construction of a deed to the jury “without limitation or restriction, and without specific instruction,” but if the jury take the correct view, a new trial will not be granted. *Morse v. Weymouth*, 28 Vt. 824 (1856).

While “the construction of a written document, where the meaning is to be collected from the document itself, is matter of pure law and for the court,” its meaning, if to be determined by reference to extrinsic facts or usages, must be submitted to the jury as a question of fact under appropriate instructions. *Gibbs v. Gilead, &c. Society*, 38 Conn. 153 (1871). Whether the printed regulations of a railroad applied to a particular train is a question of construction for the court, and it is error to submit it to the jury. *Illinois Central R. R. Co. v. Murphy*, 52 Ill. App. 65 (1893).

“The interpretation of writings is always for the court except in two cases: First, where the writing is ambiguous and the ambiguity must be solved by extrinsic, unconceded facts; and next, where the writing is merely adduced as containing evidence of certain facts, from which different inferences may be drawn, and where it is for the jury, and not the court, to draw the inferences.” *Enterprise Soap Works v. Sayers*, 55 Mo. App. 15 (1893).

Whether the written contract was made as the final agreement of the parties, is a question for the jury. *Holm v. Coleman*, 89 Wisc. 233 (1895); *Bloom v. Cox, &c. Mfg. Co.*, 83 Hun. 611 (1894).

And the meaning of a contract in a foreign language as interpreted by those familiar with it. *Badart v. Foulon* (Mich.), 61 N. W. 536 (1894). So where there is ambiguity in the contract. *Ginnath v. Blankenship*, 28 S. W. (Tex. Civ. App.), 828 (1894); *Becker v. Holm*, 89 Wisc. 86 (1894). See to same effect, *Woodbury Granite Co. v. Milliken*, 66 Vt. 465 (1894).

Where the facts attending the making of an alleged contract are in dispute, it is not error, as referring the construction of a written instrument to the jury, for the court to construe the contract upon the assumption that certain facts exist, and then leaving it to the jury to determine whether these facts do exist. *Bascom v. Smith*, 164 Mass. 61 (1895).

So the interpretation of statutes "in order to ascertain the true intent and meaning of the legislature," *i. e.*, a plain matter of fact, is a question for the court. *Com. v. Anthes*, 5 Gray, 185, 190 (1855); *Edes v. Boardman*, 58 N. H. 580, 592 (1879).

The reason on which this rule apparently at present rests is in part the necessity of a uniform administration of justice. "It is of the highest importance, not only that there should be a true and correct interpretation of the statute, . . . but also that such operation shall be equal and uniform over all those who are subject to the same government." *Com. v. Anthes*, 5 Gray, 185, 191 (1855).

The meaning of unambiguous oral language is a question for the court. *Matthews v. Park*, 159 Pa. St. 579 (1894); *Spragins v. White*, 108 N. C. 449 (1891).

NEGLIGENCE. — It is said that when the facts are undisputed, negligence is a matter of law for the court. This is an imperfect statement. It is, as has been said, part of the duty of the court to enforce the rules of correct reasoning. It is but natural, therefore, that courts should find themselves forced to attempt establishing a standard of what is reasonable conduct under certain circumstances, where the question is not as to the existence of facts, but as to the inferences to be deduced from them. *Joslin v. Le Baron*, 44 Mich. 160 (1880); *Woodward v. Hancock*, 7 Jones (Law), 384 (1860); *Mauerman v. Siemerts*, 71 Mo. 101 (1879); *Lake Shore, &c. R. R. v. Bangs*, 47 Mich. 470 (1882); *Pennsylvania R. R. Co. v. Righter*, 42 N. J. Law, 180 (1880); *Stackus v. N. Y. R. R.*, 79 N. Y. 464 (1880); *Delaware, &c., R. R. v. Converse*, 139 U. S. 469 (1891). It is also clearly of advantage on recognised grounds of public policy that certain standards of conduct should be uniformly and definitely settled, to afford serviceable guides for the future.

This can, of course, best be done by removing cases which are clearly settled either on reason or by previous action of the jury as being or not being instances of negligence, from the further consideration of the jury and deducing from them a rule of law. This is legal growth.

Beginning with clear cases on either side of the line, courts are enabled, by this process of ruling as matter of law, gradually to restrict the range of doubtful cases, with the result of more definitely establishing legal standards of conduct. *Wheelock v. Boston & Albany R. Co.*, 105 Mass. 203 (1870).

For instance, it has "become a postulate that due care requires a

pedestrian, before crossing a railroad track, to look in either direction to ascertain whether a train is approaching." *Rodrian v. N. Y., &c. R. R.*, 125 N. Y. 526 (1891); *Fletcher v. Fitchburg R. R.*, 149 Mass. 127 (1889); *Lavarenz v. Chicago, &c. R. R.*, 56 Ia. 659 (1881).

But to the contrary, *i. e.*, that the failure to look is a fact to be left with other facts to the jury, see *Texas, &c. R. R. v. Chapman*, 57 Tex. 75 (1832); *Plummer v. Eastern R. R.*, 73 Me. 591 (1882); *Terre Haute R. R. v. Voelker*, 129 Ill. 540 (1889).

Doubtful cases of negligence, which have not been covered by rules of law, where "it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts," are pure questions of fact for the jury. "It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." *Railroad Co. v. Stout*, 17 Wall. 657 (1873); *Williams v. Grealy*, 112 Mass. 79 (1873); *Randall v. Connecticut River R. R.*, 132 Mass. 269 (1882); *Teipel v. Hilsendegen*, 44 Mich. 461 (1880); *Stager v. Pass. Ry. Co.*, 119 Pa. St. 70 (1888); *Kansas Pacific R. R. v. Richardson*, 25 Kans. 391 (1881).

"It is a matter of right in the plaintiff to have the issue of negligence submitted to the jury when it depends upon conflicting evidence, or on inferences to be drawn from circumstances in regard to which there is room for a difference of opinion among intelligent men." *Payne v. Troy & Boston R. R.*, 83 N. Y. 572 (1881); *Jones v. East Tenn. R. R. Co.*, 128 U. S. 443 (1888).

"Whether there was negligence or want of ordinary care in the conduct and acts of the plaintiff under all the circumstances of this case, is a question in regard to which reasonable men may honestly hold different views. This being so, it follows that we must sustain the refusal of the court below to withdraw the case from the consideration of the jury." *Cumberland, &c. R. R. Co. v. Mangans*, 51 Md. 53 (1883); *Detroit, &c. R. R. v. Van Steinburg*, 17 Mich. 99 (1868).

It is in this sense that it is frequently said that negligence is a question of fact. Not "that the definition of negligence is one of fact, and that the jury shall be left to their own fancies to determine what, in each case, shall be the measure to which the proof shall be applied in determining whether there is negligence, but, simply, the general rule being declared as matter of law, the jury must determine whether such facts have been proved as bring the case within that general rule." *Pennsylvania Co. v. Conlan*, 101 Ill. 93 (1881).

The question of negligence, in other words, may be, and often is, a complex one involving two main questions: (1) Did the defendant do or omit to do certain things? (2) Do these acts or omissions

constitute negligence? The court may leave both these questions to the jury; or it may leave the first to the jury and rule, in a clear case, itself upon the second. In a doubtful case the court, not feeling confident of whether the reason of mankind unhesitatingly stamps the conduct as negligence, "aids its conscience by taking the opinion of the jury." Holmes, Common Law, p. 123.

DUE DILIGENCE. — What is reasonable diligence in giving notice of dishonor to the drawer or indorser of commercial paper is, when the facts are proved or admitted, a question in many cases for the court. *Walker v. Stetson*, 14 Oh. St. 89 (1862); *Bank of Upper Canada v. Smith*, 4 Q. B. U. C. 483 (1847).

But what is a "reasonable time" in which to cut and carry away cedar under a contract has been held to be "a question for the jury to determine upon evidence given on that subject." *Jenkins v. Lykes*, 19 Fla. 148 (1882).

The same considerations call for this rule as affect the action of the courts in matters of negligence. The result has been reached in the same way; *i. e.*, by establishing rulings upon clear cases, and gradually limiting the doubtful cases in which lies the province of the jury.

PROBABLE CAUSE. — So where the facts are proved or conceded, the existence of reasonable and probable cause in an action for malicious prosecution is "a question of law to be determined by the court." *Taylor v. Godfrey*, 36 Me. 528 (1853); *Jacks v. Stimpson*, 13 Ill. 701 (1852); *Barron v. Mason*, 31 Vt. 189 (1858).

So in an action for malicious prosecution, the supreme court of the United States say: "It is true that what amounts to probable cause is a question of law in a very important sense. In the celebrated case of *Sutton v. Johnstone*, 1 T. R. 493 (1786), the rule is thus laid down: 'The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable are true and existed, is a question of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law.' This is the doctrine generally adopted. *McCormick v. Sisson*, 7 Cow. (N. Y.) 715 (1827); *Besson v. Southard*, 10 N. Y. 236 (1851);" *Stewart v. Sonneborn*, 98 U. S. 187, 194 (1878).

In all these cases where, if the facts were admitted or otherwise settled, the determination of due care, reasonable and probable cause, due diligence, &c., would be matter of law for the court, the facts themselves are in dispute, it is the duty of the court to submit the question of fact to the jury with alternate rulings of law appropriate to the jury's action in determining the issue of fact. *Ash v. Marlow*, 20 Ohio, 119 (1851); *Stewart v. Sonneborn*, 98 U. S. 187 (1878).

PRELIMINARY FACTS. — In discharging his duty of presiding and enforcing the rules relating to the admissibility of evidence, either

suâ sponte or when called upon to act, many occasions arise where such admissibility depends on the determination by the judge of some preliminary fact.

Such decision is final, and not reviewable on exceptions. *Walker v. Curtis*, 116 Mass. 98 (1874). Such finding "is a finality as much as the verdict of a jury upon a question of fact." *State v. Pike*, 49 N. H. 399 (1875). "But his ruling as matter of law that such fact renders the evidence competent or incompetent is the subject of revision." *Com. v. Gray*, 129 Mass. 474 (1880).

Whether a dying declaration was made under a sense of impending dissolution is a question for the court, its weight being a matter for the jury. *State v. Tilghman*, 11 Ired. Law, 513 (1850).

The competency of a witness to a codicil to a will is "in the first instance clearly a matter for the court." *Wilson v. Van Leer*, 127 Pa. St. 371 (1889).

So whether, in case of a disputed handwriting, a certain writing is so far proved to be genuine as to serve as a safe standard for comparison, is a preliminary fact to be settled by the court. *Com. v. Coe*, 115 Mass. 481, 503 (1874).

So whether an expert is sufficiently qualified to testify is a question of fact for the court. *Jones v. Tucker*, 41 N. H. 546 (1860); *State v. Cole*, 94 N. C. 958 (1886); *Preeper v. Reg.*, 15 Sup. Ct. of Can. 401 (1888); *Com. v. Williams*, 105 Mass. 62 (1870).

Whether the subject on which the evidence of the expert is offered is such that the jury might reasonably be expected to derive benefit from expert opinion, is a matter of law. *Shafter v. Evans*, 53 Cal. 32 (1878); *White v. Ballou*, 8 All. 408 (1864); *Jones v. Tucker*, 41 N. H. 546 (1860).

So the question whether a confession offered in evidence is "voluntary," presents a fact for the decision of the judge. *Ellis v. State*, 65 Miss. 44 (1887); *State v. Pike*, 49 N. H. 399, 407 (1870).

This question cannot be submitted *in toto* to the jury except by consent. "The prisoner has always the right to require of the judge a decision of the competency of the evidence, and even after the judge has decided the evidence to be competent, the prisoner has the right to ask of the jury to disregard it, and to give no weight to it, because of the circumstances under which the confessions were obtained." *Com. v. Calder*, 126 Mass. 464 (1879).

Where secondary evidence is offered of the contents of a written document, the question whether a sufficient foundation has been laid for its admission by accounting for failure to produce the original, is a preliminary question of fact for the court. *Bell v. Kendrick*, 25 Fla. 778 (1889).

Whether a witness is qualified to testify, as being of sufficient mental capacity to understand the nature and solemnity of an oath, is question of fact for the court. *Com. v. Lynes*, 142 Mass. 577

(1886); *Peterson v. State*, 47 Ga. 524 (1873); *State v. Severson*, 78 Ia. 653 (1889); *Coleman v. Com.*, 25 Gratt. 865 (1874); *Udy v. Stewart*, 10 Ont. Rep. 591 (1886).

The court may suspend his examination as to competency to allow the witness to be instructed as to the nature and meaning of the oath, *e. g.*, by a christian minister. *Com. v. Lynes*, 142 Mass. 577 (1886).

The finding of the court may be reviewed by an upper court upon evidence duly reported. *Udy v. Stewart*, 10 Ont. Rep. 591 (1886). But the court will be very loath to disturb the finding of the lower court. "He has the child before him. We can only judge of its capacity from written evidence." *Peterson v. State*, 47 Ga. 524 (1873).

The court's inquiry in case of youth may extend to the mental capacity of a witness. *Simpson v. State*, 31 Ind. 90 (1869); *Com. v. Mullins*, 2 All. 295 (1861).

This inquiry must be conducted by the judge himself in open court and in presence of the parties. He cannot properly delegate the duty to some one else out of court, and decide according to the report. *Simpson v. State*, 31 Ind. 90 (1869).

No case has been found that "the right to the preliminary examination, when insisted on, could be denied." *Seeley v. Engell*, 13 N. Y. 542 (1856).

"The decision upon this particular question of the admissibility of the evidence is ordinarily conclusive, unless the judge sees fit to reserve or report the question. . . . There is no rule of law that, in order to render the testimony admissible, such prior fact must be established by a weight of evidence which will amount to a demonstration, and shut out all doubt on the question of its existence. It is only necessary that there should be so much evidence as to make it proper to submit the whole evidence to the jury." *Com. v. Robinson*, 146 Mass. 571 (1888).

In pursuance of its duty to enforce the exercise of correct reasoning and decide what is reasonable in connection with legal liability, it is for the court to determine, as matter of law, whether there is any evidence on which the jury can, by logical rules, reasonably find in favour of a contested proposition of fact. *School Furniture Co. v. Warsaw School Dist.*, 122 Pa. St. 494 (1888); *State v. McBryde*, 79 N. C. 393 (1887); *Chandler v. Von Roeder*, 24 How. 224 (1860); *Bridger v. Ashville, &c. R. R. Co.*, 25 S. C. 24 (1885).

"If there is, that is sufficient to send the case to the jury, no matter how strong may be the proofs to the contrary." *School Furniture Co. v. Warsaw School Dist.*, 122 Pa. St. 794 (1888); and it is the duty of the judge to send it there, "although in his opinion its preponderance should be against the plaintiff." *Gaynor v. Old Colony R. R.*, 100 Mass. 208 (1868); *Eilert v. Green Bay, &c. R. R.*, 48 Wis. 606 (1879).

"The court will not decide the question upon the preponderance of the evidence." *Cook v. Union Railway Co.*, 125 Mass. 57 (1878).

"Whether there is any evidence is a question for the judge; whether there is sufficient evidence is for the jury." *Chandler v. Von Roeder*, 24 How. 224 (1860). See, also, *State v. Stephen*, 45 La. Ann. Pt. 1, 702 (1893).

DEMURRER TO EVIDENCE.—A method of getting a ruling as matter of law from the court as to the sufficiency of certain facts to support a verdict, is by demurring to the evidence. It is the right of either party to ask the court to rule that upon the facts submitted by the opposite party, the latter has not sustained his contention. *Trout v. Virginia R. R.*, 23 Gratt. 619 (1873); *Kansas, &c., R. R. Co. v. Foster*, 39 Kans. 329 (1888).

For example, in an action for negligence, "a demurrer to the evidence must be sustained where an unavoidable inference of contributory negligence arises out of the plaintiff's own evidence, or out of other evidence which stands undisputed in the case." *Weber v. Cable Ry. Co.*, 100 Mo. 194 (1889).

This right is not waived by putting in contradictory evidence. "The defendant, by putting in its evidence, took the chance of aiding the plaintiff's case; but it was not thereby deprived of the right to ask the court to direct a verdict on all the evidence." *Weber v. Cable Ry. Co.*, 100 Mo. 194 (1889).

Indeed, it is held that the party demurring must rest his case on demurring, and that overruling a demurrer where the party demurring does not rest, cannot be assigned for error. *Columbia, &c. Railway v. Hawthorne*, 144 U. S. 202 (1892).

"The demurrer to evidence has long since gone out of use in this state, and ought not any longer to be regarded as a right upon which an exception can be predicated." *Colegrove v. N. Y., &c. R. R.*, 20 N. Y. 492 (1859).

So the supreme judicial court of Massachusetts say: "A demurrer to evidence is rarely resorted to in our practice, as the statutes furnish more simple and convenient ways of raising any questions of law." *Golden v. Knowles*, 120 Mass. 336 (1876).

"Unless all inferences are admitted which a jury might have drawn, judges, instead of confining themselves within their province of deciding on questions of law, will also become triers of every matter of fact." *Patrick v. Hallett*, 1 Johns. 241 (1806).

- **Foreign Laws.**—As has been stated, the existence of a rule of law is in reality a fact. Such facts are segregated from others largely because rules of domestic law are not the subjects of evidence, but are in a special sense within the cognisance of the court as representing that branch of government whose duty it is to enforce the rights they prescribe and the standards of conduct they

establish. Where the existence of a rule of law other than those which the court is charged with the administrative duty of enforcing, e. g., a foreign law, is a fact in issue or relevant to the issue, the reason for distinguishing rules of law from other facts at once ceases. "The existence or non-existence of a foreign law is a question of fact." *Kennard v. Kennard*, 63 N. H. 303 (1885); *Horton v. Reed*, 13 R. I. 366 (1881); *Williams v. Finlay*, 40 Oh. St. 342 (1883); *Chumasero v. Gilbert*, 24 Ill. 293 (1860); *People v. McQuaid*, 85 Mich. 123 (1891); *Ins. Co. of N. America v. Forcheimer*, 86 Ala. 541 (1888); *Condit v. Blackwell*, 19 N. J. Eq. 193 (1868); *St. L. & S. F. Ry. Co. v. Weaver*, 35 Kans. 412, 425 (1886); *Syme v. Stewart*, 17 La. Ann. 78 (1865); *Kline v. Baker*, 99 Mass. 253 (1868); *Ennis v. Smith*, 14 How. 400, 427 (1852); *Charlotte v. Chouteau*, 25 Mo. 465 (1857); *Cox v. Morrow*, 14 Ark. 603 (1854); *Polk v. Butterfield*, 9 Col. 325 (1886); *Jackson v. Jackson*, 80 Md. 176 (1894).

But on an indictment for adultery in Vermont, the marriage of the female defendant having been in New York and no proof being offered at the trial court as to the laws of New York, the supreme court say, speaking of the New York law, "It was not necessary to prove the law if it was known to the court at the trial, or if it is now known to be as decided on the trial." *State v. Rood*, 12 Vt. 396 (1840).

To contrary effect and with better reasoning, see *People v. Lambert*, 5 Mich. 349 (1858).

PROOF OF FOREIGN LAW.—In the absence of statutory provisions, the accepted rule is that proof of the foreign law is a matter for expert testimony by those familiar with it. *Kennard v. Kennard*, 63 N. H. 303 (1885); *Ennis v. Smith*, 14 How. 400, 427 (1852); *Owen v. Boyle*, 15 Me. 147 (1838); *Pierce v. Indseth*, 106 U. S. 546 (1882); *People v. Lambert*, 5 Mich. 349 (1858). "The laws of Wisconsin are not, in fact or by theory of law, known to the courts of this state and must be proved, either by experts, counsel learned in the law of that state, or copies of its statute, with the decisions of its courts thereon." *Condit v. Blackwell*, 19 N. J. Eq. 193 (1863). Speaking of some of the Wisconsin decisions on certain of their statutes, the learned Chancellor (Zabriskie) says: "I concur in (and would be bound by, if I did not) the conclusion at which the courts, with hesitation, but with sound reasoning, arrived." *Ibid.* To the same effect, the supreme court of Kansas, speaking of a cause of action which arose in Arkansas, say that "If it had been proved in the case what view the supreme court of Arkansas has taken with respect to the common law in cases of this kind, we would follow its view; and this we would do even if its views should differ from ours. If within its views the plaintiff has no cause of action, we would also hold that he has no cause of action." *St. Louis, &c. Ry. v. Weaver*, 35 Kans. 412, 426 (1886).

Speaking of the law of Virginia, the court of appeals of Maryland say, "That law is a fact to be proved in our courts, as other facts: if unwritten, by the testimony of experts; if statutory, by the law itself or exemplified copy." *Baltimore &c. R. R. v. Glenn*, 28 Md. 287 (1867); *Charlotte v. Chouteau*, 25 Mo. 465 (1857); *State v. Moy Looke*, 7 Oreg. 54 (1879). So a Spanish lawyer who has practised in Cuba, can testify from the Commercial Code as to the law of partnerships in Cuba. *Barrows v. Downs*, 9 R. I. 446 (1890).

"The law of a foreign country on a given subject may be proved by any person, who, though not a lawyer, or not having filled any public office, is or has been in a position to render it probable that he would make himself acquainted with it." *American &c. Ins. Co. v. Rosenagle*, 77 Pa. St. 507 (1875).

LAW OF OTHER STATES. — "The existence of a law of another state is a question of fact." *Ingraham v. Hart*, 5 Ohio, 255 (1842); *Miller v. MacVeagh*, 40 Ill. App. 532 (1891); *Hoyt v. McNeil*, 13 Minn. 390 (1868).

A declaration which states the alleged effect of a statute of another state instead of setting it out is demurrable. *Hoyt v. McNeil*, 13 Minn. 390 (1868).

"The relation of the United States to each other in regard to all matters not surrendered to the general government by the Constitution, are those of foreign states in close friendship, each being sovereign and independent; and the courts have generally held that therefore the laws of one state were to be proved in the courts of another only as other foreign laws." *Bayley's Adm. v. Chubb*, 16 Gratt. 284 (1862).

But, as the Arkansas supreme court say: "Where two countries have the same origin, or were at one time associated, the courts of each are bound to take judicial notice of what the law was when it was common to both," giving as an example the states of Missouri and Arkansas. *Cox v. Morrow*, 14 Ark. 603 (1854).

Where a statute of a sister state certified according to act of Congress embraces several subjects, it need not contain all its sections but only such as are relevant to the case in which it is offered. Where in the certified statute another act is referred to, the statute itself is admissible without including the statute referred to. *Grant v. Coal Co.*, 80 Pa. St. 208 (1876).

As to what is a sufficient compliance with the formalities of authentication required by the act of congress, see *Rice's Succession*, 24 La. Ann. 614 (1869). See also *Grant v. Coal Co.*, 80 Pa. St. 208 (1876).

Where the law of a sister state is an essential fact and no evidence is adduced as to what it is, the court of the forum is obliged to assume as to the law of the sister state either, (1) That the common

law prevails in the state in question on that point. (2) That the foreign law is the same as that of the forum.

Which of these assumptions is indulged in, frequently depends on whether the sister state was originally settled by those using the common law of England.

(1) It is assumed that the common law prevails in "those states which were originally colonies of England or carved out of such colonies." *Norris v. Harris*, 15 Cal. 226 (1860); *Miller v. MacVeagh*, 40 Ill. App. 532 (1891); *Eureka Springs Ry. v. Timmons*, 51 Ark. 459 (1888).

"In the absence of any proof as to the statute law of Michigan, we must assume the existence there of the common law." *Leather Co. v. Hardware &c. Co.*, 57 Mo. App. 297 (1894).

In the case of *Miller v. MacVeagh*, *ubi supra*, the court were asked to rule that while the common law would be presumed to exist in all states of the American Union which were colonies of Great Britain, judicial cognisance should be taken of the fact that Dakota (the state whose law was involved) was formed out of the "Louisiana Purchase" from France, and therefore the civil law should be presumed to exist in that state. The court in declining so to rule say: "Laws are for people and not for mere territory, as such. In the portion of the Louisiana purchase from which Dakota was formed there existed no civilised community governed by any law at the time of the cession. When Dakota was peopled and an organised community created in her territory it was by emigrants from states where the common law was in force, and by citizens who looked to that common law as their natural right and as forming the source and basis of their jurisprudence."

The same ruling is made in the courts of California. *Norris v. Harris*, 15 Cal. 226 (1860); and in those of Arkansas concerning the state of Missouri. *Eureka Springs Ry. v. Timmons*, 51 Ark. 459 (1888); and in those of Missouri. *Roll v. St. Louis Smelting Co.*, 52 Mo. App. 60 (1892).

"But no such presumption can apply to states in which a government already existed at the time of their accession to the country, as Florida, Louisiana, and Texas. They had already laws of their own, which remained in force until by the proper authority they were abrogated and new laws were promulgated. With them there is no more presumption of the existence of the common law than of any other law." *Norris v. Harris*, 15 Cal. 226, 253 (1860), per Field, C. J. So held of Texas in *Brown v. Wright*, 58 Ark. 20 (1893).

(2) When the sister state was not settled by men living under the common law, and had at the time of the cession to the United States an organised jurisprudence, the assumption of the prevalence of the common law can no longer be indulged, and recourse must be

had to another assumption, viz., — that the law of the state in question is the same as that of the forum.

“The law of the sister state of Illinois, both statutory and common, in the absence of any showing to the contrary is presumed to be the same as that of our own state.” *Bierhaus v. W. U. Tel. Co.*, 8 Ind. App. 246, 263 (1893); *Oak Leather Co. v. Union Bank*, 9 Utah, 87 (1893); *Haggin v. Haggin*, 35 Neb. 375 (1892); *Palmer v. Atchison &c. R. R.*, 101 Col. 187 (1894); *Scroggin v. McClelland*, 37 Neb. 644 (1893); *Chapman v. Brewer*, 43 Neb. 890 (1895); *Silliman v. Thornton (Tex.)*, 30 S. W. 700 (1895).

This rule applies also to England. *Wickershan v. Johnston*, 104 Cal. 407 (1894). So the rate of interest in a sister state will be presumed to be the same fixed by the statutes of Nebraska. *Fitzgerald v. Fitzgerald &c. Construction Company*, 41 Neb. 374 (1894).

Of the two assumptions, the second seems the one sustained by the weight of authority. “It is almost universally held that where there is no proof of the law of another state, nor judicial knowledge of the origin of such state which would raise a presumption that the common law prevails there, it will be presumed that the law of the forum in which the issue is being tried is the law of that state on the question under consideration.” *Kennebrew v. Southern &c. Co. (Ala.)*, 17 So. Rep. 545 (1895).

The feeling on the part of the court which leads to this course is well stated in an early California case. “The question then recurs as to what is to be presumed as to the law of Texas, in the absence of any proof on the subject. We can perceive only one way in which the question can be answered, and that is to presume the law of that state to be in accordance with our own. We are called upon to determine the matter in controversy, and are not at liberty to follow our own arbitrary notions of justice. We cannot take judicial notice of the laws of Texas, and we must therefore, as a matter of necessity, look to our own laws as furnishing the only rule of decision on which we can act; and to meet the requirement that the case is to be disposed of according to the laws of Texas, the presumption is indulged that the laws of the two states are in accordance with each other.” *Norris v. Harris*, 15 Cal. 226, 253 (1860), citing *Smoot v. Russell*, 1 Martin, N. S. 523 (1823); *Allen v. Watson*, 2 Hill (S. C.), 319 (1834); *Syme v. Stewart*, 17 La. Ann. 78 (1865); *Gardner v. Lewis*, 7 Gill. 377 (1848).

If the laws are in fact different, the party desiring the benefit of the difference “can only obtain the benefit of the foreign law by making it a part of the case in evidence.” *Cox v. Morrow*, 14 Ark. 603 (1854). See also *Simms v. So. Express Co.*, 35 Kans. 129 (1868).

The same result is reached on other grounds by the New York court of appeals relating to the law of Scotland. It is held that

prima facie the *lex fori* governs, and whoever desires the benefit of the law of any other jurisdiction must prove what that law is. *Monroe v. Douglass*, 1 Seld. 447, 452 (1851).

"With no proof before him as to the laws of Texas, the Chancellor could not determine the right to the Tyler hotel otherwise than according to our own laws." *Brown v. Wright*, 58 Ark. 20 (1893).

The supreme court of Alabama in a case where no evidence was offered of the New York rate of interest on an insurance policy decline to make either assumption and treat the evidence as failing as to an essential fact. *Ins. Co. of N. America v. Forcheimer*, 86 Ala. 541 (1888). So also in California, *Cavender v. Guild*, 4 Cal. 250 (1854). It is not perceived why such a course is not, in point of principle, correct.

PROOF, HOW MADE. — If the law in question is said to be established by the decisions of the courts of the sister state, the courts of the former will examine the officially printed reports of their decisions. The Supreme Court of Rhode Island, in an equity case, say: "The question of what is the law of Massachusetts is a question of fact, to be determined on evidence, and on such a question we can have no better evidence than the decisions of the highest judicial court of the state." *Horton v. Reed*, 13 R. I. 366 (1881); *Kennard v. Kennard*, 63 N. H. 303 (1885); *Ames v. McCamber*, 124 Mass. 85 (1878).

But there seems force in the decision of the supreme court of Kansas. "If it be claimed that we should take judicial notice of the common law of Arkansas, we would answer that we cannot do so. The courts of this state may take judicial notice of the common law of Kansas, and what it would be except for our own statutes or our own written law; and for this purpose our courts may take judicial notice of all the judicial decisions of this country, and of all other countries which have adopted the common law of England. But for the purpose that the courts of this state shall know as a fact in a particular case what the common law of some other state is, such law must be proved like any other fact." *St. Louis, &c. Ry. v. Weaver*, 35 Kans. 412 (1886). See, to same effect, *Owen v. Boyle*, 15 Me. 147 (1838).

Unofficial publications, e. g., Brightley's Pennsylvania Digest, if properly authenticated as reliable, will be admitted for the same purpose. *People v. McQuaid*, 85 Mich. 123 (1891), where the Digest was admitted on the statement of a Pennsylvania minister that he had consulted it and seen it used in court, and that it had continued publication for twenty years. The court add: "It was within the knowledge of the trial court that Brightley's Digest is not a fugitive publication."

The use of official reports of decisions is frequently provided for

by statute. *Bridger v. Asheville, &c. R. R.*, 25 S. C. 24 (1885). The volume must be produced and offered in evidence; it is not sufficient merely to refer to it. *Ibid.* *Lockwood v. Crawford*, 18 Conn. 361 (1847) is to the same effect.

"The written foreign law may be proved by a copy of the law properly authenticated. . . . They may be verified by an oath or by an exemplification of a copy, under the great seal of a state, or by a copy proved to be a true copy by a witness who has examined and compared it with the original, or by a certificate of an officer, properly authorised by law to give the copy; which certificate must be duly proved. But such modes of proof as have been mentioned are not to be considered exclusive of others, especially of codes of laws and accepted histories of the law of a country." *Ennis v. Smith*, 14 How. 400, 427 (1852); *Charlotte v. Chouteau*, 25 Mo. 465 (1857). The validity of a discharge in bankruptcy under the law of Canada can only be proved by a witness who produces a copy of the law authorising it. "Some copy of the law which the witness could swear was recognised in the Province as authoritative should have been produced." *Spaulding v. Vincent*, 24 Vt. 501 (1852). See also Pub. Sts. of Mass., Chap. 169, § 73. So a printed volume of the laws of New Brunswick, purporting and proved to be official, has been admitted as evidence of these statutes. *Owen v. Boyle*, 15 Me. 147 (1838).

"In the admiralty, as in other courts, foreign law must be pleaded and proved as a fact. . . . I believe it to be the true doctrine that the unwritten law of England may be proved in this court, not by experts only, but also by text-writers of authority and by the printed reports of adjudged cases; and that the unwritten law may be proved by the printed copies, and be construed with the aid of text-books as well as of experts." *The Pawashick*, 2 Lowell, 142 (1872).

If the government of the court of the forum has itself promulgated a foreign law or ordinance as authentic, that promulgation is sufficient proof of such law. *Talbot v. Seeman*, 1 Cranch, 1, 38 (1801).

TO WHOM PROOF IS TO BE MADE. — "The rule of the common law undoubtedly is, that the laws of other states and nations are to be proved here by documentary evidence or the testimony of witnesses; in which case the jury are the judges of the proofs, as in other questions of fact." *Lockwood v. Crawford*, 18 Conn. 361 (1847); *Thrasher v. Everhart*, 3 Gill & J. 234 (1831); *Kline v. Baker*, 99 Mass. 253 (1868); *Moore v. Gwynn*, 5 Ired. 187 (1844); *Ingraham v. Hart*, 11 Ohio, 255 (1842); *Ennis v. Smith*, 14 How. 400, 427 (1852).

The qualification of these experts is a preliminary question of fact for the court. *Kline v. Baker*, 99 Mass. 253 (1868); *Hall v. Costello*,

48 N. H. 176 (1868). And where the question to which the existence of the foreign law is relevant is one for the decision of the court, e. g., the admission of evidence, "the evidence to enable the decision to be made must of course be addressed to the court." *Pickard v. Bailey*, 26 N. H. 152 (1852); *Thrasher v. Everhart*, 3 Gill & J. 234 (1831).

But even this question the court can leave, if in doubt, to the jury, with alternative instructions. *Thrasher v. Everhart*, 3 Gill & J. 234 (1831). *Holman v. King*, 7 Metc. 384, 388 (1844), applies this rule even to the construction of foreign statutes. Like any other finding of fact, a finding of the existence of a foreign law is usually final. *Kennard v. Kennard*, 63 N. H. 303 (1885); *Williams v. Finlay*, 40 Ohio St. 342 (1883). "When the law of another state is in dispute, it is to be determined as a question of fact by the court or jury trying the case. If the evidence was conflicting, as the plaintiff contends, we have no authority to revise the finding, although the judge has reported the evidence." *Ames v. McCamber*, 124 Mass. 85 (1887).

A question much debated in *Charlotte v. Chouteau*, 25 Mo. 465 (1857), was this: Whether proof of the existence of a foreign law should first be made to the court or jury. The court conclude: "The decided weight of the American authorities goes to the length of establishing the doctrine not only that it is the province and duty of the court to instruct the jury as to the meaning and effect of a foreign law, when proved, whether the law is written or unwritten, but that the proof must be made to the court."

"It is well settled that foreign laws, like foreign judgments, are to be proved as facts, and the better opinion is that the evidence should be addressed to the court and not to the jury." *Pickard v. Bailey*, 26 N. H. 152, 169 (1852).

On the contrary, except in cases of "a statute or judicial opinion or document," in Massachusetts, "it is a general rule, that laws of other states must be proved as facts; and ordinarily, in a trial by jury, the question must be left to the jury to decide as a fact what the law of another state is, if it becomes material to be determined. This may in some cases prove inconvenient in practice, especially in view of the provision of our statute that the court shall not charge juries with respect to matters of fact; but such is the established rule in this commonwealth." *Afford v. Spaulding*, 156 Mass. 65 (1892).

"When the evidence admitted consists entirely of a written document, statute, or judicial opinion, the question of its construction and effect is for the court alone." *Kline v. Baker*, 99 Mass. 253 (1868); *Haines v. Hanrahan*, 105 Mass. 480 (1870); *Gibson v. Manufacturers' Ins. Co.*, 144 Mass. 81 (1887); *Lycoming, etc., Insurance Co. v. Wright*, 60 Vt. 515 (1888); *Charlotte v. Chouteau*, 33 Mo. 194 (1862); *Afford v. Spaulding*, 156 Mass. 65 (1892).

See also, to the effect that the court can, if so disposed, leave the question of construction of a statute to the jury, *Holman v. King*, 7 Metc. 384, 388 (1844).

But the supreme judicial court of Massachusetts will not, on exceptions, consider any statute of another state which is not made part of the bill of exceptions. *Haines v. Hanrahan*, 105 Mass. 480 (1870). To same effect, *Drake v. Glover*, 30 Ala. 382 (1857).

"The statute being authenticated in the manner pointed out by the constitution of the United States and the act of Congress, both the fact of its existence and its proper construction is matter for the court." *Moore v. Gwynn*, 5 Ired. 187 (1844); *State v. Jackson*, 2 Dev. 568 (1830).

"And if the evidence is uncontroverted and will not support the action, it is the duty of the court so to instruct the jury." *Kline v. Baker*, 99 Mass. 253 (1868).

In the North Carolina case, which actually was an instance of a written statute, the court lay down a broader rule than seems sustained by the current of authority. "The existence of a foreign law is a fact. The court cannot judicially know it, and therefore it must be proved; and the proof, like all other, necessarily goes to the jury. But when established, the meaning of the law, its construction and effect, is the province of the court. It is a matter of professional science." *State v. Jackson* (*ubi supra*).

STATUTORY PROVISIONS. — It has been usually provided that printed copies of the statutory laws of any state of the American Union, apparently published by official authority, will be received in the courts of the forum as *prima facie* evidence of the existence of such statutes.

People v. McQuaid, 85 Mich. 123 (1891); *Bridges v. Asheville R. R. Co.*, 25 S. C. 24 (1885); *Martin v. Payne*, 11 Tex. 292 (1854); *Clanton v. Barnes*, 50 Ala. 260 (1874).

So if a pamphlet copy of laws of a single session purporting to be published by authority. *Ashley v. Root*, 4 All. 504 (1862).

It is sufficient that the title-page of the volume in question bears the words "By authority." *Merrifield v. Robbins*, 8 Gray, 150 (1857). So "Printed by order of the Governor" is sufficient. *Wilt v. Cutler*, 38 Mich. 189 (1878).

Under such circumstances parol evidence or an unofficial copy of a statute cannot be received. *Martin v. Payne*, 11 Tex. 292 (1854).

CHAPTER IV.

THE GROUNDS OF BELIEF.

§ 50.¹ WE proceed now to a brief consideration of the *General Nature and Principles of Evidence*. No inquiry is here proposed into the origin of human knowledge; it being assumed, on the authority of approved writers, that all which men know is referable, in a philosophical view, to perception and reflection. But, in fact, the knowledge acquired by an individual through his own perception and reflection is but a small part of what he possesses; much of what we are content to regard and act upon as knowledge, having been acquired through the perception of others.² It is not easy to conceive that the Supreme Being, whose wisdom is so conspicuous in all His works, constituted man to believe only upon his own personal experience; since, in that case, the world could neither be governed nor improved; and society must remain in the state in which it was left by the first generation of men. On the contrary, during the period of childhood we believe implicitly almost all that is told us; and we thus are furnished with information which we could not obtain for ourselves, but which is necessary at the time for our present protection, or as the means of future improvement. This disposition to confide in the veracity of others, and to believe what they say, may be termed *instinctive*. At an early period, however, we begin to find that of the things told to us some are not true; and thus our implicit reliance on the testimony of others is weakened; first, in regard to particular things, in which we have been deceived; then, in regard to persons, whose falsehoods we have detected; and, as these instances multiply upon us, we gradually become more and more distrustful of statements made to us, and learn by experience the necessity of testing them by certain rules.³ “Confidence,” exclaimed Lord Chatham, on a

¹ Gr. Ev. § 7, nearly verbatim. p. 42.² Abercr. on Intell. Pow., Part 2, ³ Id. Part 2, § 3, p. 73.

memorable occasion, "is a plant of slow growth in an aged bosom;" and indeed, it may be generally observed, that, as our ability to obtain knowledge by other means increases, our instinctive and indiscriminate reliance on testimony diminishes, by yielding to a more rational belief.¹ Still, in every period of life,

¹ Gr. Ev. § 7, n. verbatim. See also Gamb. Guide, 87; M'Kinnon, Phil. of Ev. 40. Dr. Reid, in his Inquiry into the Human Mind, c. 6, § 24, pp. 196, 197 of his collected Works, observes:—"The wise and beneficent Author of Nature, who intended that we should be social creatures, and that we should receive the greatest and most important part of our knowledge by the information of others, hath, for these purposes, implanted in our nature two principles, that tally with each other. The first of these principles is a propensity to speak truth, and to use the signs of language, so as to convey our real sentiments. This principle has a powerful operation, even in the greatest liars; for where they lie once they speak truth a hundred times. Truth is always uppermost, and is the natural issue of the mind. It requires no art or training, no inducement or temptation, but only that we yield to a natural impulse. Lying, on the contrary, is doing violence to our nature; and is never practised, even by the worst men, without some temptation. Speaking truth is like using our natural food, which we would do from appetite, although it answered no end; but lying is like taking physic, which is nauseous to the taste, and which no man takes but for some end, which he cannot otherwise attain. * * * Another original principle, implanted in us by the Supreme Being, is a disposition to confide in the veracity of others, and to believe what they tell us. This is the counterpart to the former: and as that may be called the principle of veracity, we shall, for want of a proper name, call this the principle of credulity. It is unlimited in children until they meet with instances of deceit and falsehood; and it contains a very considerable degree of strength through life. If nature had

left the mind of the speaker in equilibrio, without any inclination to the side of truth more than to that of falsehood, children would lie as often as they speak truth, until reason was so far ripened, as to suggest the imprudence of lying, or conscience, as to suggest its immorality. And if nature had left the mind of the hearer in equilibrio, without any inclination to the side of belief more than to that of disbelief, we should take no man's word, until we had positive evidence that he spoke truth. His testimony would, in this case, have no more authority than his dreams, which may be true or false: but no man is disposed to believe them, on this account, that they were dreamed. It is evident, that, in the matter of testimony, the balance of human judgment is by nature inclined to the side of belief; and turns to that side of itself, when there is nothing put into the opposite scale. If it was not so, no proposition, that is uttered in discourse would be believed, until it was examined and tried by reason: and most men would be unable to find reasons for believing the thousandth part of what is told them. Such distrust and incredulity would deprive us of the greatest benefits of society, and place us in a worse condition than that of savages. Children, on this supposition, would be absolutely incredulous, and therefore absolutely incapable of instruction; those who had little knowledge of human life, and of the manners and characters of men, would be in the next degree incredulous; and the most credulous men would be those of greatest experience, and of the deepest penetration; because, in many cases, they would be able to find good reasons for believing testimony, which the weak and the ignorant could not discover. In a word, if credulity were the effect of

and in every state of intellectual culture, man is instinctively more prone to believe than to disbelieve the testimony of others, and this disposition towards credulity may be regarded as a fundamental principle of our moral nature, implanted in us by the Almighty for the wisest and most beneficent purposes. As such it constitutes the general basis upon which all evidence may be said to rest.

§ 51.¹ Subordinate to this paramount and original principle, evidence rests upon our *faith in human testimony, as sanctioned by experience*; that is, upon the generally experienced truth of the statements on oath of men of integrity, having capacity and opportunity for observation, and without apparent influence from passion or interest to pervert the truth. This belief is strengthened by our knowledge of the narrator's reputation for veracity and intelligence, by the absence of conflicting testimony, and by the presence of that which is corroborating and cumulative.²

§ 52. In the hasty progress of a trial at Nisi Prius, it is difficult, and sometimes impossible, to ascertain, with anything like certainty, what characters the witnesses respectively deserve for honesty and intelligence, and how far they are actuated by interested, malignant, or other improper motives. A rigid cross-examination, skilfully applied,³ will, however, often throw much light upon these subjects; while a careful attention to the demeanour of the witness is always a good guide. While simplicity, minuteness, and ease are the natural accompaniments of truth, the language of witnesses coming to impose upon the jury is usually laboured, cautious, and indistinct.⁴ We have, too, more or less

reasoning and experience, it must grow up and gather strength, in the same proportion as reason and experience do. But if it is the gift of nature, it will be strongest in childhood, and limited and restrained by experience; and the most superficial view of human life shows, that the last is really the case, and not the first."

¹ Gr. Ev. § 10, nearly verbatim.

² Archbishop Whately, in his *jeu d'esprit*, "Historic Doubts relative to Napoleon Buonaparte," clearly states the main tests of human veracity. He says: "I suppose it will not be denied that the three following are among the most im-

portant points to be ascertained, in deciding on the credibility of witnesses: first, whether they have the means of gaining correct information; secondly, whether they have any interest in concealing truth, or propagating falsehood; and, thirdly, whether they agree in their testimony."—P. 14, 6th ed.

³ In the Tichborne trial of 1871, Mr. Hawkins' cross-examination of Mr. Baigent should be carefully studied, as being the best modern example of forensic ability in that direction.

⁴ Channing, *Ev. of Christ*, 3rd vol. of Works, 356.

conclusive indications of insincerity or falsehood when we find a witness over-zealous on behalf of his party; exaggerating circumstances; assuming an air of bluster and defiance;¹ answering without waiting to hear the question; forgetting facts where he would be open to contradiction; minutely remembering others, which he knows cannot be disputed;² reluctant in giving adverse testimony; replying evasively or flippantly;³ pretending not to hear the question, for the purpose of gaining time to consider the effect of his answer; affecting indifference; or often vowing to God⁴ and protesting his honesty.⁵ In the testimony of witnesses of truth there is, on the other hand, a calmness and simplicity; a naturalness of manner; an unaffected readiness and copiousness of detail, as well in one part of the narrative as another; and an evident disregard of either the facility or difficulty of vindication or detection.⁶

§ 53. Besides these tests of truth, which are obviously of value in fixing what amount of credit is due to each *individual* witness, certain general rules must be borne in mind, as bearing upon the relative merits of particular *classes of witnesses*. It has been said that “a propensity to lying has been always, more or less, a peculiar feature in the character of an enslaved people,—accustomed to oppression of every kind, and to be called upon to render strict account of every trifle done, not according to the rules of justice, but as the caprice of their masters may suggest;—it is little to be wondered at if a lie is often resorted to as a supposed refuge from punishment, and that thus an habitual disregard is engendered.”⁷ This passage accounts in some measure for the lamentable neglect of truth evinced by most Oriental nations, by Russians, and by some of the Irish peasantry.

¹ “Asseveration blustering in your face
Makes contradiction such a
hopeless case.”

COWPER, *Conversation*.

² “For, when we risk no contradiction,
It prompts the tongue to deal
in fiction.”

GAY's *Fables*, Part I., Fable x.

³ “All persons who have been
accustomed to see witnesses in a
court of justice know, that those who

are stating falsehoods are extremely
apt to give flippant and impertinent
answers.” Per Mr. Brougham on
the Queen's trial, 1820.

⁴ “And even when sober truth
prevails throughout,
They swear it, till affirmation
breeds a doubt.”

COWPER, *Conversation*.

⁵ 1 St. Ev. 547.

⁶ Greenl. on Test. of Evang. § 40.

⁷ Bp. of Tasmania's Lect. on Christ.
Catechism, 519.

§ 54. Again, as exaggeration chiefly springs from an innate vain love of the marvellous,¹ and is most remarkable in the softer sex,² a prudent man will, in general, do well to weigh with some caution the testimony of *female witnesses*. This is the more necessary, in consequence of the extensive and dangerous field of falsehood opened up by mere exaggeration; for, as truth is made the groundwork of the picture, and fiction lends but light and shade, to detect the lurking falsehood often requires much patience and acuteness.³ In short, the intermixture of truth disarms the suspicion of the candid, and sanctions the ready belief of the malevolent.⁴ If due allowance be made for this feminine weakness of a proneness to exaggerate, the testimony of women is at least deserving of equal credit to that of men. Indeed, in some respects they are superior witnesses; for first, they are, in general, closer observers than men; next, their memories, being less loaded with matters of business, are usually more tenacious; and lastly, they often possess unrivalled powers of simple and unaffected narration.⁵

¹ Bp. of Tasmania's Lecture on Christ. Catechism, 522.

² The *woman* of Samaria, for instance, when told by our Saviour that she had had five husbands, went into the city, saying, "Come, see a man, which told me *all things that ever I did*." 4th ch. of St. John, v. 29.

³ Bp. of Tasmania's Lect. on Christ. Catechism, 522. The difficulty of detecting falsehood engrafted on truth has been noticed by Tennyson, in the "Grandmother":—

"and the parson . . . said likewise,

That a lie which is half a truth is
ever the blackest of lies,

That a lie which is all a lie may be
met and fought with outright,

But a lie which is part a truth is a
harder matter to fight."

Mr. Brougham, in the Queen's trial, 1820, said: "If an individual were to invent a story entirely,—if he were to form it completely of falsehoods, the result would be his inevitable detection; but if he build a structure of falsehood on the foundation of a little truth, he may raise a tale which, with

a good deal of drilling, may put an honest man's life, or an illustrious Princess' reputation, in jeopardy." 1 Ld. Br. Sp. 147. And, again: "The most effectual way, because the safest, of laying a plot, is not to swear too hard, is not to swear too much, or to come too directly to the point; but to lay the foundation in existing facts and real circumstances,—to knit the false with the true,—to interlace reality with fiction,—to build the fanciful fabric upon that which exists in nature,—and to escape detection by taking most especial care, as they have done here, never to have two witnesses to the same facts, and also to make the facts as moderate, and as little offensive, as possible." 1 Ld. Br. Sp. 215.

⁴ Bp. of Tasmania's Lect. on Christ. Catechism, 522.

⁵ Take, for instance, the Letters of Madame de Sévigné, or Lady Mary Wortley Montagu. The only letters written by men which at all equal them are those of the effeminate Ld. Orford.

§ 55. Sir William Blackstone apparently thought,¹ that less credit was due to the testimony of a *child* than to that of an adult; but reason and experience scarcely warrant this opinion. In childhood, observation and memory are usually more active than in after life, while the motives for falsehood are less numerous and powerful. The inexperience and artlessness accompanying tender years usually render a child incapable of sustaining consistent perjury, while they operate powerfully in preventing his true testimony from being shaken. A child comprehending the drift of the questions put in cross-examination has no course but to answer them according to the fact. Thus, if he speak falsely, he is almost inevitably detected; but if he be the witness of truth, he avoids even that suspicion of dishonesty, which sometimes attaches to older witnesses, who, though substantially telling the truth, throw discredit on their testimony, by a too anxious desire to reconcile every apparent inconsistency.

§ 56. The testimony of foreigners and of others, who are brought from a distance to the place of trial, requires to be scrutinised with more than common caution. Such persons speak before a tribunal, which ordinarily knows no more of them than they care for it, whose threat they have no reason to fear, and whose good opinion they utterly disregard. Consequently they are obviously far less likely to be influenced by the dread of having their falsehoods exposed than witnesses living on the spot.² Such witnesses, even if detected of perjury, have little to fear from loss of character, and are in no real danger of punishment. A dishonest foreigner, who has attained a tolerable knowledge of our language, may, too, conceal it, and by seeking the assistance of an interpreter, obtain an opportunity of preparing with caution his answer to any inconvenient question during the time that the interpreter is furnishing him with a needless translation.³

§ 57. The testimony against a prisoner of *policemen, constables*, and others employed in the suppression and detection of crime, should usually be watched with care; not because they intentionally pervert the truth, but because their professional zeal and

¹ 4 Bl. Com. 216.

id. p. 241.

² Per Mr. Brougham on the Queen's trial, 1820. 1 Ld. Br. Sp. 126. See

³ Id. 168. See *R. v. Burke*, 1850 (Ir.), cited post, § 1441.

habitual contact with bad men and women almost necessarily leads them to ascribe all actions to the worst motives, and to give a colouring of guilt to facts and conversations, which, in themselves, are consistent with perfect rectitude.¹ The creed of the police is naturally apt to be that "all men are guilty, till they are proved to be innocent."

§ 58. The testimony of *skilled witnesses* is perhaps that which deserves least credit with a jury. These usually speak to *opinions* and not to facts; and it is often really surprising to see the facility and extent to which views can be made to coincide with wishes or interests. Skilled witnesses do not, indeed, wilfully misrepresent what they think: but their judgments have often become so warped by regarding the subject from only one point of view, that they are, in truth, not capable of forming an independent opinion even when they would conscientiously desire to do so. Being zealous partisans, their belief becomes synonymous with the Apostle's² definition of Faith, "the substance of things *hoped for*, the evidence of things *not seen*." Lord Campbell once said, "Skilled witnesses come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence."³

§ 59. Coincidences in the testimony of independent witnesses afford a *third* ground for the credibility of evidence. Such coincidences, when numerous, and presenting themselves as undesigned, or incidental, necessarily produce a prodigious effect in enforcing belief; because, if the witnesses had concerted a plot, the coincidences would almost inevitably have been converted by cross-examination into contradictions;⁴ while, if the supposition of collusion, or that some deception has been practised on the witnesses, be excluded, then coincidences and harmony in

¹ See post, § 68.

² Ep. to the Hebrews, c. xi., v. 1.

³ Tracy Peer., 1843. See post, § 68.

⁴ Mr. Brougham said on the Queen's trial:—"Why were there never two witnesses to the same fact? Because it is dangerous; because, when you are making a plot, you should have one witness to a fact,

and another to a confirmation; have some things true, which unimpeachable evidence can prove; other things fabricated, without which the true would be of no avail,—but avoid calling two witnesses to the same thing at the same time, because the cross-examination is extremely likely to make them contradict each other."

1 *Ld. Br. Sp.* 215, 1820.

the evidence of several persons can be explained upon no other hypothesis than that their individual statements are true. Each witness taken singly may be notorious for lying; but the chances against their all agreeing by accident in the same lie may be so great as to render the agreement morally impossible.¹ It has been remarked, that "in a number of concurrent testimonies, where there has been no previous concert, there is a probability distinct from that which may be termed the sum of the probabilities resulting from the testimonies of the witnesses; a probability which would remain, even though the witnesses were of such a character as to merit no faith at all. This probability arises purely from the concurrence itself. That such a concurrence should spring from chance, is as one to infinite; that is, in other words, morally impossible. If, therefore, concert be excluded, there remains no cause but the reality of the fact."²

§ 60. Lord Mansfield gave expression to the truth of this principle when he once observed, "It is objected that the books [Keble's and Freeman's Reports] are of no authority; but if both the reporters were the worst that ever reported, if *substantially* they report a case in the same way, it is demonstration of the truth of what they report, or they could not agree."³ Dr. Paley, in his *Evidences of Christianity*, says that "the usual character of human testimony is *substantial truth, under circumstantial variety*. This is what the daily experience of courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression upon the minds of the judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud."⁴ These last observations apply with almost over-

¹ Aber. on Intell. Pow., Part 2, § 3, p. 91.

² Campbell's Philos. of Rhetoric, ch. v., b. 1, par. 3, p. 125; Whately's Rhetoric, Part 1, ch. 2, § 4, pp. 58, 59.

³ R. v. Genge, 1774. The word

"substantially" here used is highly important, with a view to the question of collusion, since it is scarcely possible that several independent witnesses should tell precisely the same tale, without any variation.

⁴ Part 3, ch. 1, p. 158.

whelming force when the facts deposed to consist of conversations, or of a series of trifling and unimportant events, and the testimony is given after the lapse of a considerable interval of time.¹

§ 61.² *Fourthly*, in receiving the knowledge of facts from the testimony of others, men are much influenced by their *accordance with facts previously known or believed*; and this constitutes what is termed their *probability*. Statements, thus probable, are received upon evidence much less cogent than is required for the belief of those which do not accord with previous knowledge; but while such statements are more readily received, and justly relied upon, care should be taken lest all others be unduly distrusted. While unbounded credulity is the attribute of weak minds,—which quo magis nesciunt, eo magis admirantur,—indiscriminate scepticism belongs only to those who, affecting to make their own knowledge and observation the exclusive standard of probability, forget that they are liable to be misled even by their own senses.³ Such persons, therefore, if they intend to sustain a truly consistent character, should act like Molière's Docteur, in "Le Mariage Forcé," who, in answer to Sganarelle's statement that he had come to see him, replied, "Seigneur Sganarelle, changez, s'il vous plait, cette façon de parler. Notre philosophie ordonne de ne point énoncer de proposition décisive, de parler de tout avec incertitude, de suspendre toujours son jugement; et par cette raison vous ne pouvez pas dire, je suis venu, mais, *il me semble que je suis venu*."⁴ Even sceptical philosophers, true to the nature of man, but inconsistently with their avowed principles, receive a large portion of their knowledge upon testimony which has been derived, not from their own experience, but from that of other men; and they will even do this about matters which are at variance with their own personal observation. Thus they receive with confidence the testimony of the historian in regard to the occurrences of ancient times; that of the naturalist and the traveller, in regard to the natural history and civil condition of other countries; and that of the astronomer, respecting the heavenly bodies; facts which, upon

¹ See further on this interesting subject, Greenl. on Test. of Evang. §§ 34—36.

² Gr. Ev. § 8, in great part.

³ Abercr. on Intell. Pow., Part 2,

§ 3, p. 74. Channing, on Ev. of Revealed Relig., 3rd vol. of Works, p. 116, observes—"All my senses have sometimes given false reports."

⁴ Scène 8.

the narrow basis of their own "firm and unalterable experience," which is so much relied upon by Hume, they ought to reject, as wholly unworthy of belief.¹

§ 62. The sceptical philosopher is not the only person, however, who is reluctant to lend faith to a narrative of facts, which do not strictly accord with preconceived opinions that are mistaken for knowledge. Persons of a similar stamp of mind to his are abundant in all ranks and conditions. Thus, the king of Siam rejected the testimony of the Dutch ambassador, that, in his country, water was sometimes congealed into a solid mass; for it was utterly repugnant to his own experience;² the stories of the Abyssinian traveller Bruce were long considered mere fictions; and in 1825, the evidence of George Stephenson, before a parliamentary committee, was much impaired by his venturing an opinion, that steam-carriages might possibly travel on railroads twelve miles an hour.³ With his finite knowledge, man should, in truth, on the one hand, be slow to reject a narrative as incredible, merely because it is beyond, or even contrary to, his own very limited experience. On the other hand, scientific knowledge is not confined within the narrow limits of *ascertained* facts, but enlarges the understanding so as to prepare it for the further reception of truth, and sets it free from many of the prejudices which influence men, whose minds are limited by merely the narrow field of actual experience. For example, Archimedes, deeply imbued as he was with science, might well have believed an account of the invention and wonderful powers of the steam-engine, which unscientific Englishmen of the last century would have rejected as incredible and absurd.⁴

§ 63.⁵ A *fifth* basis of evidence is the known and experienced *connexion* subsisting *between collateral facts* or circumstances satisfactorily proved, and *facts* and circumstances such as those which are *in controversy*. This is merely the legal application of a process

¹ Abercr. on Intell. Pow., Part 2, § 3, pp. 79, 80.

² *Id.* p. 75.

³ Life of George Stephenson, by Samuel Smiles, 1857, ch. 19.

⁴ Abercr. on Intell. Pow., Part 2, § 3, pp. 75, 76. So Voltaire shrewdly

observes:—"Là où le vulgaire rit, le philosophe admire; et il rit où le vulgaire ouvre de grands yeux stupides d'étonnement." Vol. 42, p. 142.

⁵ Gr. Ev. § 11, verbatim, except the notes.

familiar in natural philosophy, namely, that of proving the truth of an hypothesis by showing its coincidence with existing phenomena. Such connections and coincidences may be either physical or moral; and the knowledge of them is derived from the known laws of matter and motion, from animal instincts, and from the physical, intellectual, and moral constitution and habits of man.¹ Their degree of force depends on their sufficiency to exclude every other hypothesis but the one under consideration, and will be considered hereafter.² Meanwhile a good illustration of the legal application of the principle is afforded by the doctrine of law by which the possession of goods recently stolen, accompanied with personal proximity in point of time and place to them by the party charged, accompanied by inability on his part to show how he came by them, naturally, though not necessarily,³ excludes every hypothesis but that of his guilt, although the possession of the same goods at another time and place would warrant no such conclusion, since it leaves room for the hypothesis of the goods having been lawfully purchased in the course of trade. Another illustration of the same principle is afforded by the legal rule of construction "*noscitur a sociis*," which implies that the meaning of words in a written instrument is ascertained by the context.

§ 64.⁴ In considering this subject, it must always be borne in mind, that in the actual occurrences of human life nothing is inconsistent. Every event, which actually transpires, has its appropriate relation and place in the vast complication of circumstances of which the affairs of men consist; it owes its origin to those which have preceded it; it is intimately connected with many others which occur at the same time and place, and often with those of remote regions; and, in its turn, it gives birth to a thousand others which succeed.⁵ In all this system of inter-dependence perfect harmony prevails; so that a man can hardly invent a story, which, if closely

¹ For an amusing example of a fact proved by a long chain of circumstantial evidence, see Voltaire's *Zadig*, ch. 3.

² Post, §§ 64—69.

³ For Joseph's cup was found in Benjamin's sack, Gen. c. 44, v. 1—17. The story of the Hunchback, in the *Arabian Nights*, and that of the

Baked Head, in Mr. Morier's *Hajji Baba*, both turn on an erroneous presumption of guilt arising from recent possession. See, too, Smollett's *Roderick Random*, ch. xxi.

⁴ Gr. Ev. § 12, in great part.

⁵ 1 St. Ev. 560; 3 Channing's Works, 133, 340.

compared with all the actual contemporaneous and successive occurrences, may not be shown to be false. From these causes, minds enlarged by long and matured experience, and close observation of the conduct and affairs of men, may, with a rapidity and certainty approaching to intuition, perceive the elements of truth or falsehood in the face itself of the narrator, without any regard to the narrative. Thus, an experienced judge may instantly discover the falsehood of a witness, whose story an inexperienced jury might be inclined to believe. But though the mind, in these cases, seems to have acquired a new power, it is properly to be referred only to experience and observation.

§ 65.¹ In trials of fact, it will generally be found that the *factum probandum* is either directly attested by those who speak from their own actual and personal knowledge of its existence, or is to be inferred from other facts, satisfactorily proved. In the former case, the proof rests upon the *second*, *third*, and *fourth* grounds of belief before mentioned; that is, it depends, partly, upon faith in human testimony, as sanctioned by experience;—which faith will be increased or diminished in proportion to the apparent honesty and intelligence of the witnesses, and their opportunities for observation;—partly, upon the exercise of reason on the consistency of the narratives given by different witnesses;—and here the value of the testimony will vary, according to the number of the deponents, and the apparent absence or presence of collusion;—and partly upon the conformity of the testimony with experience. In the latter case, however, namely, when the fact in dispute is to be inferred from other facts satisfactorily established, the proof rests upon the grounds before mentioned, with the addition of the connexion shown by knowledge and experience to usually exist between collateral facts such as those which have been proved, and facts such as those which are in controversy; which connexion has already been pointed out to constitute the *fifth* basis of evidence before stated. In both the two cases which have been above supposed, the facts proved are directly attested. In the former one, the proof applies immediately to the *factum probandum*, without any intervening process, and is therefore called *direct* or *positive*

¹ Gr. Ev. § 13, in great part.

testimony. In the latter case, the proof applies immediately to collateral facts, supposed to have a connexion, near or remote, with the fact in controversy, and is termed *circumstantial*; and sometimes (although not with entire accuracy) *presumptive*. For example, if a witness testifies that he saw A. inflict a mortal wound on B., of which B. instantly died, this is a case of direct evidence. If, however, a witness only testifies that a deceased person was shot with a pistol, and it is proved from other sources that the wadding was found to be part of a letter addressed to the prisoner, the residue of which was discovered in his pocket, the facts themselves are directly attested; but the evidence which they afford is termed *circumstantial*. From such facts, if unexplained by the prisoner, the jury may, or may not, *deduce*, or *infer*, or *presume* his guilt, according as they are satisfied, or not, of the natural connexion between similar facts and the guilt of the person thus connected with them. In both cases the veracity of the witness is presumed, in the absence of proof to the contrary; but in the latter case there is an additional presumption or inference, founded on the known usual connexion between the facts proved, and the guilt of the party implicated. This operation of the mind, which is more complex and difficult in the latter case, has caused the evidence afforded by circumstances to be sometimes termed *presumptive evidence*; though, in truth, the mental operation is similar in both cases.

§ 66. Much has been said and written respecting the comparative value of direct and circumstantial evidence; but one argument urged in favour of circumstantial evidence is palpably erroneous. "Witnesses may lie, but circumstances cannot,"¹ has been more than once repeated from the bench, and is now almost received as a judicial axiom. Yet no proposition can be more false or dangerous. If "circumstances" mean—and they can have no other meaning—those facts which lead to the inference of the fact in issue, they not only can, but constantly do lie—in the sense that the conclusion deduced from them is false. For example, when the viper fastened on St. Paul's hand at Melita, the barbarians said "*No doubt this man is a murderer*;" but when they saw that no harm came to

¹ *Annesley v. Ld. Anglesea*, (Ir.) 1743 (Mountenoy, B.); *R. v. Blandy*, 1752 (Legge, B.).

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¹ *Annesley v. Id. Anglesea*, (Ir.) 1743 (Mountenoy, B.); *R. v. Blandy*, 1752 (Legge, B.).

him, "they changed their minds, and said that he was a god,"¹ and both conclusions were alike false. Again, in *Macbeth*, Lenox, Macduff, and the other chieftains are described as erroneously assuming, first, that the grooms had murdered the King, because "their hands and faces were all badged with blood, so were their daggers, which unwiped we found upon their pillows:"² and next, that "they were suborned" by the King's two sons, who had "stolen away and fled."³ In truth, the only "circumstances which cannot lie" are those which *necessarily* lead to a certain conclusion. Who is to decide on this necessity? Clearly those who have also to decide on the fact in issue. Throw a case of circumstantial evidence into the form of a syllogism, and it will be found that the major premiss rests solely on the erring experience of the tribunal to whom it is presented. Besides, these very circumstances must be proved, like direct facts, by witnesses, who are equally capable with others of deceiving⁴ or of being deceived. In no sense therefore is it possible to say, that a conclusion drawn from circumstantial evidence can amount to absolute certainty, or, in other words, that circumstances cannot lie.

§ 67. It may not be without some advantage to keep in mind the dangers against which juries should especially guard, in deciding cases supported by each species of testimony. In a case sought to be established by *direct* evidence the witnesses are usually few, and there consequently is the more reason to apprehend conspiracy and fraud; since it is far more easy to find

¹ The Acts, xxviii. 3—5. So, when Jacob saw Joseph's coat of many colours stained with kid's blood, "he knew it, and said, 'It is my son's coat; an evil beast hath devoured

him; Joseph is *without doubt* rent in pieces.' " Gen. xxvii. 33.

² Act ii., sc. 3.

³ Act ii., sc. 4.

⁴ Iago's story of the handkerchief, which goaded Othello to madness, will occur to everyone:—

"IAGO. Have you not sometimes seen a handkerchief,
Spotted with strawberries, in your wife's hand?"

OTHELLO. I gave her such a one; 'twas my first gift.

IAGO. I knew not that; but such a handkerchief,
(I am sure it was your wife's,) did I to-day
See Cassio wipe his beard with.

OTHELLO. If it be that,—

IAGO. If it be that, or any that was hers,
It speaks against her, with the other proofs.

OTHELLO. Oh! that the slave had forty thousand lives—
One is too poor, too weak for my revenge!
Now do I see 'tis true."

OTHELLO, Act iii., Sc. iii.

two or three persons who, from motives of interest or malignity, will combine to aggrandise themselves, or to ruin an opponent, than to get together a larger number. The story, too, being for the most part simple, is readily concocted and remembered, while its very simplicity renders it extremely difficult, on cross-examination, to detect the imposture. The uncorroborated statements of single witnesses, especially when they testify to atrocious crimes, such as rape, &c.,¹ or are known, like accomplices,² to be persons of bad character, and to have an interest in the result, are in consequence regarded with distrust, and, in practice, generally deemed insufficient to warrant a conviction.

§ 68. In cases supported by circumstantial evidence, juries should remember, that, although the number of facts drawn from apparently independent sources renders concerted perjury both highly improbable in itself, and easy of detection if attempted;³ yet, the witnesses in such cases are more likely to make unintentional misstatements, than those who give direct testimony. The truth of the facts they attest depends frequently on minute and careful observation, and experience teaches the danger of relying implicitly on the evidence of even the most conscientious witnesses, respecting dates, time, distances, footprints, handwriting, admissions, loose conversations, and questions of identity. Yet these in general are the links in the chain of circumstances, by which guilt is sought to be established. The number too of the witnesses, who must *all* speak the truth, or some link will be wanting, renders additional caution the more necessary. Besides, it must be remembered, that, in a case of circumstantial evidence, the facts are collected by *degrees*. Something occurs to raise a suspicion against a particular party. Constables and police officers are immediately on the alert, and, with professional zeal, ransack every place and paper, and examine into every circumstance which can tend to establish, not his innocence, but his guilt. Presuming him guilty from the first, they are apt to consider his acquittal as a tacit reflection on their discrimination or skill, and, with something like the feeling of a keen sportsman, they determine, if possible, to

¹ 1 Hale, 635.

² R. v. Jones, 1809.

³ Greenl. on Test. of Evang. § 40.

bag their game. Though both sportsmen and policemen alike would be horrified at anything unfair or “unsportsmanlike,” yet, as both start with this object in view, it is easy to unintentionally misinterpret innocent actions, to misunderstand innocent words, for men readily believe what they anxiously desire,¹ and to be ever ready to construe the most harmless facts as confirmations of preconceived opinions.² These feelings are common alike to the police, to counsel, engineers, surveyors,³ medical men, antiquarians, and philosophers; indeed, to all persons who first assume that a fact or system is true, and then seek for arguments to support and prove its truth.

§ 69. But, even where the facts sworn to are satisfactorily proved, the task of the jury in cases turning on circumstantial evidence is highly difficult. For they must decide, not whether these facts are consistent with the prisoner’s guilt, but whether they are inconsistent with any other rational conclusion; since it is only on this last hypothesis that they can safely convict the accused.⁴

¹ A striking illustration of this was the credit that was given by the whole civilised world to the lying telegram which, in October, 1854, announced the fall of Sebastopol.

² Ante, § 57.

³ *Waters v. Thorn*, 1856 (Romilly, M.R.).

⁴ *R. v. Hodge*, 1838.

CHAPTER V.

PRESUMPTIVE EVIDENCE.

§ 70.¹ PRESUMPTIVE EVIDENCE is usually divided into two branches, namely, *presumptions of law*, and *presumptions of fact*. PRESUMPTIONS OF LAW consist of those rules, which, in certain cases, either forbid or dispense with any ulterior inquiry. Presumptions of law are sub-divided into two classes, namely, *conclusive* and *disputable*. For the general doctrines in accordance with which presumptions are made are not peculiar to municipal law, but are common to all departments of science. For instance, the presumption of a malicious intent to kill from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal found with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle of its application. The one fact being proved or ascertained, the other, its uniform concomitant, is universally and safely presumed. The presumption, however, has more or less force, in proportion to the universality of the experience; and this furnishes the reason for the distribution of presumptions of law into the two classes which we have mentioned, namely, *conclusive* and *disputable*.

§ 71.² *Conclusive*, or, as they are sometimes termed, imperative, or absolute presumptions of law, are rules determining the quantity of evidence requisite for the support of any particular averment, and forbidding such averment to be overcome by any evidence that the fact is otherwise after the degree of proof which they demand has been furnished. Conclusive presumptions exist chiefly in those cases in which the long-experienced connexion, just alluded to, has been found so general and uniform, as to render it expedient for the common good, that such connexion should be taken to be

¹ Gr. Ev. § 14, largely.

² Gr. Ev. § 15, largely.

inseparable and universal. They have been adopted by common consent, from motives of common policy, for the sake of greater certainty, and the promotion of peace and quiet in the community. Where they arise all corroborating evidence is dispensed with, and all opposing evidence is forbidden.¹

§ 72. Sometimes this common consent is expressly declared through the medium of the legislature in *statutes*. Thus, under the Bankruptcy Act, 1883, in the absence of fraud, the approval of the Court, testified by a certificate of the official receiver, is conclusive as to the validity of any composition, or general scheme of arrangement, accepted in pursuance of the Act;² all the requisitions of the Public Schools Act, 1868, in respect to any statutes made by the governing body of a school, "shall be deemed to have been duly complied with," so soon as the statutes themselves have been approved by Her Majesty in Council;³ under the Endowed Schools Act, 1869, an Order in Council approving a scheme is conclusive evidence of its validity;⁴ under the Valuation Metropolitan Act, 1869, "the valuation list for the time being in force shall be deemed to have been duly made;"⁵ under the Act for the protection of bankers, it is enacted that "any draft or order drawn upon a banker payable to *order* on demand, which shall, when presented for payment, *purport* to be indorsed by the *person to whom the same shall be drawn payable*,"⁶ shall be a sufficient

¹ The presumption in Roman law is defined to be, "*conjectura, ducta ab eo, quod ut plurimum fit. Ea conjectura vel a lege inducitur, vel a iudice. Quæ ab ipsâ lege inducitur, vel ita comparata, ut probationem contrarii haud admittat; vel ut eadem possit elidi. Priorem doctores præsumptionem JURIS ET DE JURE, posteriorem præsumptionem JURIS, appellant. Quæ a Iudice inducitur conjectura, præsumptio HOMINIS vocari solet; et semper admittit probationem contrarii, quamvis, si alicujus momenti sit, probandi onere relevet.*" Hein. ad Pand., Pars iv. § 124. Of the former, answering to our conclusive presumption, Mascardus observes,—"*Super hac præsumptione lex firmum sancit jus, et eam pro veritate habet.*" 1 de Prob., Quæst. x.

48. An exception to the conclusiveness of this class of presumptions is allowed by the civil law, when the presumption is met by an admission *in judicio*.

² 46 & 47 V. c. 52, § 18, subs. 9; 53 & 54 V. c. 71, § 3, subs. 13. As to presumptions which, in the absence of fraud arose under the Bankruptcy Act of 1869, see 32 & 33 V. c. 71, § 127.

³ 31 & 32 V. c. 118, § 8, subs. 4.

⁴ 32 & 33 V. c. 56, § 47.

⁵ 32 & 33 V. c. 67, § 45. See also "The Local Government Act, 1888" (51 & 52 V. c. 41).

⁶ These words include the payee's agent, though not really authorized to endorse, see *Charles v. Blackwell*, 1877, C. A.

authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker¹ to prove that such indorsement, or any subsequent indorsement, was made by, or under the direction of, the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof;² and, under the Stamp Act, 1891, "a bill of exchange or promissory note purporting to be drawn or made out of the United Kingdom, is, for the purpose of this Act, to be deemed to have been so drawn or made, although it may in fact have been drawn or made within the United Kingdom."³

§ 73. Again: by the Statutes of Limitations,⁴ where a simple contract debt has not been distinctly recognised within six years as a subsisting obligation, either in some writing signed by the party chargeable, or his agent, or by part payment of principal, or by payment of interest,⁵ such debt⁶ is, at the end of the six years, conclusively presumed to have been paid; and a presumption of satisfaction arises with respect to all injuries, the remedy for which is an action on the case, other than slander, trespass to goods or land, or for detainee⁷ or replevin, unless they have been sued for within six years after the cause of action shall have accrued;⁸ while actions for an assault or false imprisonment must be brought within four years;⁴ for slander, within two years;⁴ for compensation to the families of persons killed by accident, within twelve calendar months from the death of the deceased.⁹ Actions under the Employers' Liability Act must be commenced within six months from the date of the

¹ This enactment does not protect any other person than a banker who takes a cheque on the faith of a forged indorsement. *Ogden v. Benas*, 1874.

² This Act is extended to drafts by the Paymaster-General by 35 & 36 V. c. 44, § 11. See, also, 45 & 46 V. c. 61, § 60. And see *Hare v. Copland*, 1862 (Ir.).

³ 54 & 55 V. c. 39, § 36.

⁴ 21 J. 1, c. 16 ("The Limitation Act, 1623"); 16 & 17 V. c. 113, § 20 (Ir.). The first-named Act is amended by 19 & 20 V. c. 97, § 9.

⁵ The St. of Limitat. 21 J. 1, c. 16,

applies to an action of debt for a penalty under a by-law. *Tobacco-pipe Makers' Co. v. Loder*, 1851.

⁶ 9 G. 4, c. 14, § 1; 19 & 20 V. c. 97, § 13.

⁷ See *Wilkinson v. Verity*, 1871, as to when the cause of action will accrue in detainee.

⁸ 21 J. 1, c. 16, § 3. As to when concealed fraud and non-discovery can be pleaded in reply to a defence under the Stat., see *Gibbs v. Guild*, 1882, C. A. See, also, *Barber v. Houston*, 1885 (Ir.).

⁹ 9 & 10 V. c. 93, § 3, as amended by 27 & 28 V. c. 95.

accident, or, in case of death, “within twelve months from the time of death.”¹

§ 73A. The Public Authorities Protection Act, 1893,² enacts³ that where, after 1st January, 1894, “any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty or authority, the following provisions shall have effect:—

- (a) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof:
- (b) Wherever in any such action a judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client:
- (c) Where the proceeding is an action for damages, tender of amends before the action was commenced may, in lieu of or in addition to any other plea, be pleaded. If the action was commenced after the tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs, to be taxed as between solicitor and client, as from the time of the tender or payment; but this provision shall not affect costs on any injunction in the action:
- (d) If in the opinion of the court the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding, the court

¹ 43 & 44 V. c. 42, § 4. A notice that injury has been sustained must also be given “within six weeks,” though in cases of death, the judge

has power to relax the stringency of this last rule.

² 56 & 57 V. c. 61.

³ § 1.

may award to the defendant costs to be taxed as between solicitor and client.

“This section shall not affect any proceedings by any department of the Government against any local authority or officer of a local authority.”

By § 2 of the Act last cited so much of any public general Act is repealed as enacts, with reference to any proceeding, that—

- “(a) The proceeding is to be commenced in any particular place; or
- (b) The proceeding is to be commenced within any particular time; or
- (c) Notice of action is to be given; or
- (d) The defendant is to be entitled to any particular kind or amount of costs, or the plaintiff is to be deprived of costs in any specified event; or
- (e) The defendant may plead the general issue.”

The section then repeals various older enactments.

A provision contained in an earlier Act, which was passed in 1842,¹ provides that actions for anything done in pursuance of any public local and personal Act, or any local and personal Act, shall be brought within two years after the cause of action shall have accrued, or in the case of continuing damage, within one year after the damage shall have ceased.² Any action, prosecution, or proceeding against any person for any act done in pursuance or intended execution of the Army Act, 1881, or of the Militia Act, 1882, must be commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of damage within six months next after the ceasing thereof.³ Actions and proceedings against persons acting under the Seamen's Clothing Act, 1869,⁴ or the Municipal Corporations Act, 1882,⁵ must be commenced within six months after the act complained of shall have been committed.⁶ Justices of the peace in England fall within the protection of the Public Authorities Protection Act, and in Ireland every action against a justice of the peace for

¹ 5 & 6 V. c. 97.

² § 5.

³ 44 & 45 V. c. 58, § 170, subs. 1, amended by “The Army (Annual) Act, 1894” (57 V. c. 8), § 7; 45 & 46

V. c. 49, § 46.

⁴ 32 & 33 V. c. 57, § 6.

⁵ 45 & 46 V. c. 50, § 226.

⁶ See note ¹, *post*, p. 74.

anything done by him in the execution of his office must be brought within six months.¹ On similar principles, when a judgment has been obtained against a banking copartnership, no execution can issue thereon against any former member of such copartnership, after the expiration of *three years* next after the person sought to be charged shall have ceased to be a member.²

§ 74. Presumptions that their rights have been satisfied or in some other way extinguished are, in like manner, sometimes raised by statute against the Crown or the Duchy of Cornwall. Thus, the right of the Sovereign,³ or of the Duke of Cornwall,⁴ to institute legal proceedings for the recovery of lands, rents, or minerals, is barred, under several special statutes, by uninterrupted possession for a period of sixty, or in certain cases, of one hundred years.

§ 74A. Length of enjoyment, too, as between subjects of the Crown raises a conclusive presumption of right. Thus, the possession of land, or of rent, for the length of time mentioned in the general statutes of limitation, under a claim of absolute title and ownership, constitutes a conclusive presumption of a valid grant;⁵

¹ 12 & 13 V. c. 16 ("The Justices Protection (Ireland) Act, 1840"), § 8. In Scotland, under "The Summary Proc. Act, 1864," the period is fixed at two months, 27 & 28 V. c. 53, § 35.

² 7 G. 4, c. 46, § 13 ("The Country Bankers Act, 1826"). See *In re North of Engl. Joint Stock Bank Co.*, *Ex parte Gouthwaite*, 1851; *Barker v. Buttriss*, 1845.

³ 9 G. 3, c. 16, amended by "The Stat. Law Rev. Act, 1888" (51 V. c. 3); 24 & 25 V. c. 62; 39 & 40 V. c. 37 (Ir.).

⁴ 7 & 8 V. c. 105, §§ 73 et seq.; 23 & 24 V. c. 53; 24 & 25 V. c. 62 ("The Crown Suits Act, 1861").

⁵ This period has for many years past been shortened, at successive revisions of the law, both in England and the United States. In 1833 the Act of 3 & 4 W. 4, c. 27 ("The Real Property Limitation Act, 1833"), § 2, passed, and barred all actions to recover land or rent, after twenty years from the time when the right of action accrued; unless, at such time, the plaintiff or the party through whom he claims shall have been under some disability, specified in the Act, in which case he is allowed ten years from the ceasing of the dis-

ability; provided that in no case shall an action be brought after forty years from the time when the right first accrued, although the period of ten years shall not have expired: §§ 16 and 17. This statutory rule is extended by §§ 24 and 25 to all claims in equity for the recovery of land: *Magdalen College v. Att.-Gen.*, 1857, H. L.; it also applies to a claim for dower: *Marshall v. Smith*, 1865 (Stuart, V.-C.); to a claim for compensation for equitable waste: *D. of Leeds v. Ld. Amherst*, 1846; and to the claim of an annuity charged upon land by will, the twenty years in this last case being calculated from the death of the testator: *James v. Salter*, 1837. The sections just referred to do not, however, apply to spiritual or eleemosynary corporations sole, who are empowered by § 29 to bring actions or suits to recover land or rent within two successive incumbencies and six years, or, in case these periods do not amount to sixty years, then within sixty years next after the right of action shall first have accrued. See *Ecclesias. Commis. v. Rowe*, 1880, H. L. §§ 30–33 limit the time within which advowsons can be

the payment of a *modus*, or the *adverse*, and as of *right* enjoyment of land *tithe-free*, for the periods specified in the Act of 2 & 3 W. 4, c. 100,¹ conclusively bars the right of all parties, even the Queen, to recover tithes, unless such payment has been made, or enjoyment had, under an express written consent or agreement.²

§ 75. The principle that, by statute, rights are after a certain time to be presumed to be extinguished is further exemplified by the rule that on the completion of any contract of sale of land, the period of the commencement of title which a purchaser may require (or, in the language of conveyancers, the root of title) is now fixed by statute at forty years, unless there be some stipulation to the contrary in the contract, or some very special circumstances in the case.³

§ 75A. Again, by the Prescription Act, 1832,⁴ the length of time

recovered, while § 40 enacts, that all moneys charged upon land and legacies shall be deemed satisfied at the end of twenty years, unless some interest shall have been paid, or some written acknowledgment shall have been given in the meanwhile. Under § 28 no mortgagor shall bring a suit to redeem a mortgage but within twenty years from the time when the mortgagee took possession (see *Kinsman v. Rouse*, 1881), or from the last written acknowledgment of the mortgagor's title. Mortgagees also may bring actions to recover land at any time within twenty years next after the last payment of any part of the principal or interest secured by the mortgage: 7 W. 4 & 1 V. c. 28; *Doe v. Eyre*, 1851; *Doe v. Massey*, 1851; *Ford v. Ager*, 1863; provided that such last payment be itself within twenty years from the date of the mortgage: *Hemming v. Blanton*, 1873; and provided that the payment be made by the mortgagor, or by some person bound to make it on his behalf: *Harlock v. Ashberry*, 1882. On 1st January, 1879, the "Real Property Limitation Act, 1874" (37 & 38 V. c. 57), came into operation, and by it these periods of limitation were reduced by six, twelve, and thirty years being substituted for the ten, twenty, and forty years mentioned in the Acts of

1833 and 1837. 6 & 7 V. c. 54, and 7 & 8 V. c. 27, extend to Ireland such of the provisions of 3 & 4 W. 4, c. 27, as were not already in force there, and explain and amend that Act. The period of twenty years has been adopted in most of the United States. See 4 Kent, Com. 188, n. a. The same period in regard to the title to real property, or, as some construe it, only to the profits of the land, is adopted in the Hindoo law: 1 Macnagh. Elem. of Hindoo L. 201. See, as to the Scotch law, 37 & 38 V. c. 94, §§ 13, 34.

¹ See *Salkeld v. Johnson*, 1848. See, also, *Fellowes v. Clay*, 1842, and *Salkeld v. Johnson*, 1846.

² See *Toymbee v. Brown*, 1849.

³ 37 & 38 V. c. 78 ("The Vendor and Purchaser Act, 1874"), § 1.

⁴ 2 & 3 W. 4, c. 71,—extended to Ireland by 21 & 22 V. c. 42,—limits the period of legal memory as follows:—In cases of rights of common or other profits or benefits arising out of lands, except tithes, rent, and services, *primâ facie* to thirty years, and conclusively to sixty years, unless it shall appear that such rights were enjoyed by some consent or agreement expressly given or made by deed or writing: § 1; in cases of ways or other easements, watercourses, or the use of water, *primâ facie* to twenty years, and conclusively to forty years, unless it

which constitutes the period of legal memory, or, in other words, which affords a legal title in respect of incorporeal rights,¹ has been definitely fixed.

§ 75b. Further, by the Real Property Limitation Act, 1833,² the time within which actions for rent due under a lease, actions of covenant,³ or debt on specialties,⁴ and debt or *scire facias* on a recognizance,² may be brought, is expressly limited. So, likewise, by the same enactment, is the time for actions for debt or on an award, where the submission is not by specialty; for copyhold-fines, escapes, money levied on a *scire facias*, or for penalties.⁵

§ 75c. Again, as regards religious trusts. Where any real or personal estate, subject to a trust for a Roman Catholic charity, has been applied upon some trusts connected with that religion for twenty years, but the original trusts cannot be ascertained by any document, a *consistent usage of twenty years* is, by statute, rendered conclusive evidence of the trusts on which the property has been settled.⁶ Under Lord Lyndhurst's Act for regulating suits relating

shall be proved, in like manner, by written evidence, that the same were enjoyed by consent of the owner: § 2; and in cases of lights, conclusively to twenty years, unless it shall be proved, in like manner, that the same were enjoyed by consent: § 3. See *Bewley v. Atkinson*, 1880; *Tapling v. Jones*, 1865; *Lanfranchi v. Mackenzie*, 1857; *Aynsley v. Glover*, 1875. § 4 directs, that the before-mentioned periods shall be deemed those next before some suit or action respecting the claims, and further defines what shall amount to an interruption. § 6 enacts, that no presumption shall be made in support of any claim, upon proof of the enjoyment of the right for any less period than the period mentioned in the Act as applicable to the nature of the claim. § 7 provides for parties who are under legal disabilities. As to what evidence of user is necessary under this Act, see *Lowe v. Carpenter*, 1851; *Hollins v. Verney*, 1884, C. A.

¹ A right to the passage of air and light to a garden: *Potts v. Smith*, 1869 (Malins, V.-C.); or of air to a windmill or house, is not within the meaning of this Act: *Webb v. Bird*, 1865; *Bryant v. Lefever*, 1879, C. A.;

nor is a claim of "a free fishery" in the waters of another proprietor: *Shuttleworth v. Le Fleming*, 1865; *Smith v. Andrews*, 1891. For "prescription pre-supposes a grant," see *Smith v. Andrews*, supra, and no grant of the right claimed can here be imagined.

² 3 & 4 W. 4, c. 27. As to specialties, see § 3 of this Act. § 4, as amended by 19 & 20 V. c. 97, § 10, provides for parties under legal disabilities, and § 5 states the effect of an acknowledgment in writing or part payment. See the Irish Act of 16 & 17 V. c. 113, §§ 20—24; also *Alliance Bk. of Simla v. Carey*, 1870.

³ See *In re Baker*, *Collins v. Rhodes*, 1882.

⁴ The term "specialty" includes all actions on statutes, as, for instance, an action against a shareholder of a company for calls: *Cork & Bandon Rail. Co. v. Goode*, 1853; *Shepherd v. Hills*, 1857.

⁵ See, also, as to actions for penalties, 31 El. c. 5, § 5, as limited by 11 & 12 V. c. 43 ("The Summary Jurisdiction Act, 1848"), § 36, and amended by "The Stat. Law Rev. Act, 1888" (51 V. c. 3), and *Robinson v. Curry*, 1881; overruling *Dyer v. Best*, 1866.

⁶ 23 & 24 V. c. 134, § 5.

to meeting-houses and other property held for religious purposes by dissenters, *the usage for twenty-five years* immediately preceding any such suit, shall be taken as conclusive evidence that the religious doctrines, opinions, or mode of worship, which for that period have been taught or observed in these houses, may properly be taught or observed, provided the contrary is not declared by the instrument declaring the trusts of such houses, either in express terms or by reference to some other document.¹

§§ 76-8. The principle that after the lapse of a certain period it must be presumed that the offender is innocent, or, at all events, must not be called upon to defend himself, is also one which finds a place in Criminal Jurisprudence. Many statutes accordingly limit the period within which particular offenders may be prosecuted. Some of the principal of these are mentioned in the footnote.² Clauses of this nature will be found in a vast variety of

¹ 7 & 8 V. c. 45 ("The Nonconformist Chapels Act, 1844"), § 2. See *Att.-Gen. v. Bunce*, 1868 (Malins, V.-C.).

² The under-mentioned statutes (arranged in alphabetical order) prescribe periods of limitation which are respectively as follows, viz.:—"The Army Act, 1881" (44 & 45 V. c. 58, § 161), creates a limitation of three years for offences other than mutiny, desertion, or fraudulent enlistment, and by it absolute immunity is conferred (except for the offence of desertion on active service) by three years' exemplary service; "The Births and Deaths Registration Act, 1874" (as to England, 37 & 38 V. c. 88, § 46, and as to Ireland, 43 & 44 V. c. 13, § 36), creates a limitation of three years; "The Clergy Discipline Act, 1892" (55 & 56 V. c. 32, § 5, with which compare former Acts on this subject, as construed in *Denison v. Ditcher*, 1857; *Ditcher v. Denison*, 1857; *Bishop of Hereford v. T—n*, 1853; and *Simpson v. Flamank*, 1867), creates (by § 5) a limitation of five years, or of two years after conviction by a temporal court; "The Coal Mines Regulation Act, 1887" (50 & 51 V. c. 58, § 62), one of three months; "The Corrupt Practices Act, 1883" (46 & 47 V. c. 51, § 51, and Part 12 of "The Municipal Corporations Act, 1882," viz., 45 & 46

V. c. 50, § 78), unless against a party who has absconded, creates a limitation of one year from date of offence, or within three months after report of commissioners; offences against "The Customs Act, 1876" (39 & 40 V. c. 36, § 257), must be prosecuted within three years from commission of the offence; offences against "The Diseases of Animals Act, 1894" (57 & 58 V. c. 57), must be prosecuted within the time limited by the Summary Jurisdiction Acts (which see); offences against "The Factory and Workshops Act, 1878" (41 V. c. 16, § 91), within two to three months (varying with the offence) from commission of act; a false declaration, in order to procure a marriage to take place out of its proper district (3 & 4 V. c. 72, § 4), within eighteen months from the marriage; high treason, or misprision of treason (7 W. 3, c. 3, §§ 5, 6, extended to Scotland 7 Anne, c. 11), within three years after offence; summary proceedings under "The Merchant Shipping Act, 1894" (57 & 58 V. c. 60, § 683), on the construction of which see *Austin v. Olsen*, 1868, must be usually taken six months, but in some cases within two months of the date of the alleged offence; offences against the Marriage Acts (the English "Marriage Act, 1836," being 6 & 7 W. 4, c. 85, on the construction of which see *R. v. Ld. Dun-*

statutes, to which it is considered unnecessary to make particular reference.¹

§ 79. The principle upon which these statutes rest would appear to be simply the broad one of general expedience and justice, rather than upon that of any presumption, for "*Interest reipublicæ ut sit finis litium.*" When a party has been in undisputed possession of property for a considerable length of time, it is harsh to deprive him of that which, however obtained, has now acquired the character of a vested interest. No presumption of a former grant is, however, necessary to give validity to his title, but it rests on the fact of long uninterrupted enjoyment. When a person has foregone a claim for many years, there is, indeed, no need for presuming that he has, in reality, been satis-

boyne, 1850, and the Irish Act being 7 & 8 V. c. 27, § 13), within three years, or in the case of offences under the Irish Act, punishable on summary conviction (7 & 8 V. c. 81, §§ 48, 78; also 26 & 27 V. c. 27, § 16), within three months, or in the case of false declarations to procure a marriage out of its proper district, within the time stated above, under head "False Declaration"; "The Mines Regulation Act, 1872" (35 & 36 V. c. 76, § 63, r. 1; and c. 77, § 34, r. 1, extended to Isle of Man by 54 & 55 V. c. 47), requires offences against it to be prosecuted within three months; "The Municipal Corporations Act, 1882" (45 & 46 V. c. 50, § 219, subs. 1), requires proceedings for offences and fines under it to be taken within six months from act; proceedings under the Public Health Acts (of 1875, for England, being 38 & 39 V. c. 55, § 252, and of 1878, being 41 & 42 V. c. 52, § 250, for Ireland), must be taken within six months from when matter arose; proceedings under "The Naval Discipline Act, 1866" (29 & 30 V. c. 109, § 54), within three years from offence, or if offender has been abroad, one year from his return; proceedings under "The Night Poaching Act, 1844" (being 7 & 8 V. c. 29), are, as to indictable offences (by 9 G. 4, c. 59, § 4, and 7 & 8 V. c. 29, as to the construction of which see *R. v. Casbolt*, 1869), to be within twelve calendar months; and as to offences punish-

able on summary conviction, to be within six calendar months, the commencement of the prosecution being the laying of an information, or the obtaining of a warrant: see *R. v. Parker*, 1864; *R. v. Hull*, 1860; *R. v. Brooks*, 1847; *R. v. Killminster*, 1835; and *R. v. Mainwaring*, 1858; under "The Prevention of Cruelty to Children Act, 1894" (57 & 58 V. c. 41), by § 18(3), a summary conviction must be within six months of the offence. The Summary Jurisdiction Acts, in all cases where no time is specially limited, require that complaint shall be made, and information laid, within six calendar months. See "The Summary Jurisdiction Act, 1848" (11 & 12 V. c. 43), § 11.

¹ Various periods of limitation are also imposed by 11 & 12 V. c. 118, § 3; 1 G. 1, st. 2, c. 5, § 8; 33 G. 3, c. 67, § 8; 4 G. 4, c. 76, § 21 ("The Marriage Act, 1823"); 60 G. 3 & 1 G. 4, c. 1 (partially repealed by "The Stat. Law Rev. Act, 1893," 56 & 57 V. c. 61), § 7; 6 A. c. 7, § 3; 23 & 24 V. c. 107, § 32 (Ir.) ("The Refreshment Houses (Ireland) Act, 1860"); 14 & 15 V. c. 93, § 10, r. 4 (Ir.); "The Merchandise Marks Act, 1887" (50 & 51 V. c. 28), § 15. In Scotland summary complaints must, in general, be instituted "within six months from the time when the matter of such complaint arose." 27 & 28 V. c. 53, § 24. See as to the Police Courts in Edinburgh, 30 & 31 V. c. 58, sch. § 172.

fied; it is sufficient to say that his right to recover is lost by his own negligence. The statute of James, which has been held not to discharge the debt, but merely to bar the remedy, is strongly confirmatory of these views.¹ Lord Plunket once eloquently said, "If Time destroys the evidence of title, the laws have wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with his scythe in one hand to mow down the muniments of our rights; but in his other hand the law-giver has placed an hour-glass, by which he metes out incessantly those portions of duration, which render needless the evidence that he has swept away."²

§ 80.³ The doctrines of irrebuttable presumptions are sometimes (as in most of the instances just cited) embodied in statutes. In other instances they are declared by judicial tribunals as being the *common law* of the land. The decisions of the courts on such matters are respected, equally with the enactments of the legislature, as authoritative declarations of imperative rules of law, against the operation of which no averment or evidence is received. In short, in determining the legal rights and liabilities of parties, the courts conclusively presume that which in a vast number of cases must of course be contrary to the fact.⁴ For instance, it is conclusively presumed that every sane person, above the age of fourteen, is acquainted with the criminal as well as the civil,⁵ the common⁶ as well as the statute,⁷ law of the land; and the doctrine "*ignorantia juris, quod quisque tenetur scire, neminem excusat*," is as uniformly recognised in this country, as it formerly was in ancient Rome;⁸ and, indeed, has been carried so far as to include the case of a foreigner, who was here charged with a crime, which

¹ *Spears v. Hartly*, 1857; *Higgins v. Scott*, 1832.

² See "Statesmen of the Time of George III.," by Ld. Brougham, 3rd Ser. p. 227, n. In *Malone v. O'Connor*, 1859 (Ir.), Napier, C., the above passage is cited as follows:—"Time, with the one hand mows down the muniments of our titles; with the other, he metes out the portions of duration which render these muniments no longer necessary." *Drury's Cas.* in Ch. temp. Napier, 644. This version is probably more accurate than any other, as it was furnished to the Chancellor by one of the counsel in the *quare*

impedit, on the trial of which Ld. Plunket made use of the imagery in his address to the jury.

³ Gr. Ev. § 17, as to first six lines.

⁴ See *Martindale v. Falkner*, 1846 (Maule, J.)

⁵ *Bilbie v. Lumley*, 1802 (Lord Ellenborough).

⁶ A mistake of the legal effect of a document cannot be set up as a defence. *Powell v. Smith*, 1872 (Ld. Romilly).

⁷ See *Stokes v. Salomons*, 1851 (Turner, V.-C.); *The Charlotta*, 1814 (Sir W. Scott); *Middleton v. Croft*, 1736 (Ld. Hardwicke).

⁸ See 1 Russ. C. & M. 154; 1 Hale, 42; Ff. 22, 6, 9.

was no offence in his own country.¹ It is again conclusively presumed that every^{1a} sane man of the age of discretion contemplates the natural and probable *consequences* of his own acts. Thus an intent to kill is conclusively inferred from the deliberate violent use of a deadly weapon;² on an indictment for cutting with intent to do the prosecutor some grievous bodily harm,³ the prisoner is rightly convicted, though it appeared that his real intent was to wound another person;⁴ an intent to defraud a particular party will be conclusively presumed on an indictment for forgery, provided the defrauding of such party would be the natural result of the prisoner's act, if successful,⁵ and this even though it be proved that the prisoner did not entertain the intention charged;⁶ and on a charge of arson for setting fire to a mill, an intent to injure or defraud the mill-owners will be conclusively inferred from the wilful act of firing.⁷ The same doctrine would, apparently, on principle, apply to all other crimes.⁸

§ 81. There are, indeed, several decisions which tend to show that where the character of statutory offences varies according to the intent with which they are perpetrated, the *real* intention of the prisoner must be left to the jury. For instance, on an indict-

¹ *R. v. Esop*, 1836 (Bosanquet and Vaughan, JJ.); *Barronet's case*, 1853.

^{1a} *Gr. Ev.* § 18, as to four following lines.

² See 1 *Russ. C. & M.* 940, 941; *R. v. Dixon*, 1814. But if death does not ensue till a year and a day, that is, a full year, after the stroke, it is conclusively presumed that the stroke was not the sole cause of the death, and it is not murder. 4 *Bl. Com.* 197; *Glassf. Ev.* 592. The doctrine of presumptive evidence was familiar to the Mosaic Code; even to the letter of the principle stated in the text. See *Numb.* xxxv. 16, 17, 18, where every instrument of *iron* is conclusively taken to be a deadly weapon; and the use of any such weapon raises a conclusive presumption of malice. The same presumption arose from *lying in ambush*, and thence destroying another. *Id.* v. 20. But, in other cases, the existence of malice was to be proved, as one of the facts in the case; and in the absence of express malice, the offence was reduced to the degree of manslaughter, as at the common law. *Id.*

vv. 21, 22, 23. This very reasonable distinction seems to have been unknown to the Gentoo Code, which demands life for life, in all cases, except where the culprit is a Brahmin. "If a man deprives another of life, the magistrate shall deprive that person of life." *Halhed's Gentoo Laws*, b. xvi. § 1, p. 233.

³ Under the repealed Act of 43 G. 3, c. 58.

⁴ *R. v. Hunt*, 1825; *R. v. Fretwell*, 1864. See, also, *R. v. Smith*, 1855, which was an indictment under the repealed Act, 7 W. 4 & 1 V. c. 85, § 5; and *R. v. Ward*, under 14 & 15 V. c. 19, § 5 (fifteen judges).

⁵ *R. v. Beard*, 1837 (Coleridge, J.); *R. v. Hill*, 1838 (Alderson, B.); *R. v. Cooke*, 1838 (Patteson, J.).

⁶ *R. v. Sheppard*, 1806; *R. v. Maza-gora*, 1815 (all the judges); *R. v. Geach*, 1840. The prisoner may also be convicted on a count charging the real intent. *R. v. Hanson*, 1841 (by all the judges).

⁷ *R. v. Farrington*, 1811; *R. v. Philp*, 1830.

⁸ See *R. v. Murphy*, 1875.

ment for cutting;¹ where the intent laid in the several counts was to murder, to disable, and to do grievous bodily harm, but the intent found by the jury was to prevent being apprehended, it was held that a conviction could not be sustained, though the prisoner had inflicted a serious wound;² where a party was charged with inflicting an injury dangerous to life with intent to murder, it was held³ that the jury must be satisfied that the prisoner, at the time he committed the assault, had formed a deliberate intention of murdering his victim; on an indictment⁴ charging the prisoner with shooting at the prosecutor with intent to murder him, the jury were allowed to pronounce a verdict in accordance with the actual intent, which was to kill another person, and the prisoner was consequently acquitted;⁵ on the same principle, where the prisoner was charged⁶ with causing poison to be taken by the prosecutor with intent to murder him, and it appeared that the prisoner's real intention was to poison another party, he was acquitted.⁷

§ 82. Nevertheless it is submitted that the distinction which these decisions seek to establish is founded on no sound principle, and goes far towards frittering away one of the most valuable presumptions known to the criminal law. Moreover, one judge of great experience in the administration of criminal justice refused to recognise the distinction.⁸

§ 82A. It is immaterial whether the intent charged be the principal or subordinate motive which instigated the commission of the

¹ Under the repealed Act of 43 G. 3, c. 58.

² *R. v. Duffin*, 1818. This case is badly reported, and perhaps the decision turned upon the ground that the attempted apprehension was not lawful.

³ *R. v. Cruse*, 1838 (Patteson, J.). But the jury *may* infer such intent from the circumstance that if death had been caused it would, under the circumstances, have been murder: *R. v. Jones*, 1840 (Patteson, J.).

⁴ Under 9 G. 4, c. 31; repealed by 24 & 25 V. c. 95, and other provisions enacted in 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861").

⁵ *R. v. Holt*, 1836 (Littledale, J.).

The learned judge observed, in summing up: "If this had been a case of murder, and the prisoner intending to murder one person, had, by mistake, murdered another, he would be equally liable to be found guilty. The question, however, may be different on the construction of this Act of Parliament."

⁶ Under 7 W. 4 & 1 V. c. 85, § 2; repealed by 24 & 25 V. c. 95, and other provisions enacted in 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), amended by 48 & 49 V. c. 69.

⁷ *R. v. Ryan*, 1839 (Parke and Alderson, BB.).

⁸ *R. v. Lewis*, 1833 (Gurney, B.); *R. v. Jarvis*, 1837 (*id.*).

crime. Therefore where the jury found that a prisoner had wounded the prosecutor with the view of preventing his lawful apprehension, and that, *in order to effect that purpose*, he intended to do him some grievous bodily harm, the conviction on a count charging the latter offence was held right.¹ And the same rule has been applied where the immediate object of the criminal was to rob the party he wounded, and the wound was inflicted as the means of effecting the robbery.²

§ 83. The presumption that a party intends the natural consequences of his acts, also extends to civil responsibilities. Thus, in an action for libel,³ the deliberate publication of calumny, which the publisher knows to be false, or has no reason to believe to be true, is by statute taken to raise a conclusive presumption of malice;⁴ if a party make a representation, which he knows to be false, and injury ensues to another, it will be inferred by law that he was actuated by a fraudulent or malicious intent;⁵ the wilful neglect of a defendant to plead within the time appointed by law, is taken conclusively against him, as a confession of the plaintiff's right of action;⁶ if a person who is, in the language of the Bankruptcy Act, "unable to pay his debts as they become due from his own money," spontaneously make a transfer or payment in favour of any creditor, which necessarily has the effect of defeating or delaying his other creditors, it will be conclusively presumed to have been made with that intent, and the transfer or payment will be set aside as fraudulent, though all fraud in fact may be distinctly negatived if the payer or transferor is adjudged bankrupt on a petition presented within three months from the date of the transaction.⁷

¹ *R. v. Gillow*, 1825.

² *R. v. Bowen*, 1841 (Coleridge, J.).

³ See 6 & 7 V. c. 96 ("The Libel Act, 1843"), § 6.

⁴ *Haire v. Wilson*, 1829; *R. v. Shipley*, 1784 (Ashhurst, J.); *Fisher v. Clement*, 1830 (Ld. Tenterden); *Baylis v. Lawrence*, 1840 (Patteson, J.); *Rodwell v. Osgood*, 1825 (Am.).

⁵ *Tapp v. Lee*, 1803; *Foster v. Charles*, 1830; *Pontifex v. Bignold*, 1841.

⁶ *R. S. C.* 1883, Ord. XXVII. r. 2 et seq. The principle of this Order

belongs to general jurisprudence. So in the Roman law: "*Contumacia eorum, qui jus dicenti non obtemperant, litis damno coercetur.*" Dig. lib. 42, t. 1, l. 53. "*Si citatus aliquis non compareat, habetur pro consensione.*" 3 Masc. de Prob. p. 253, concl. 1159, n. 26.

⁷ 46 & 47 V. c. 52, § 48, and 35 & 36 V. c. 58, § 53, Ir. See *Ex parte Craven*, 1870; *In re Craven, Ex parte Tempest*, 1871; *Brown v. Kempton*, 1850; *In re Cheesebrough*, 1871; *Smith v. Cannan*, 1854; *In re Wood*,

§ 84. Conclusive presumptions are, again, made in favour of all judicial proceedings. Thus, as an undoubted rule of pleading, nothing will be intended to be out of the jurisdiction of a superior court but that which is so expressly alleged, so that the records of superior courts, among which are the courts of the Counties Palatine, need not state the cause of action to have arisen within the jurisdiction;¹ whenever the contrary does not plainly and expressly appear, the respective Houses of Parliament will be conclusively presumed to have acted within their jurisdiction, and agreeably to the usages of Parliament, and the rules of law and justice. So that a warrant issued by the Speaker of the House of Commons at the instance of the House for the arrest of a witness need not contain any recital of the grounds on which it was founded;² all writs issued by any Division of the High Court of Justice are presumed to be issued duly in a case in which the court has jurisdiction, unless the contrary appears on the face of them, so that such writs of themselves, and without any further allegation, protect all officers and others in their aid acting under them, and this even though they appear on the face of them to be irregular, or even void in form.³ The respect due to the High Court, and the credit given to it, that it will not abuse its powers, furnish alike the reason and the justification for this somewhat arbitrary presumption.⁴

§ 85.⁵ The irrebuttable presumption that all judicial proceedings have been regularly conducted, has, among others, the following consequences. It is assumed, at least *prima facie*, that the unreversed sentence of a foreign or colonial court of competent jurisdiction is correct, since otherwise our courts would be, in effect, constituting themselves courts of appeal, without power to reverse the judgment.⁶ Judicial acts are, as a general rule, con-

1872; *Ex parte Bailey*, *In re Barrell*, 1852; *Bittlestone v. Cooke*, 1856; *Bell v. Simpson*, 1857; *Bills v. Smith*, 1863. See, also, as to the avoidance of voluntary settlements, 46 & 47 V. c. 52, § 47; and 35 & 36 V. c. 58, § 52, *Ir.*

¹ *Peacock v. Bell*, 1667, recognised in *Gosset v. Howard*, 1847.

² *Gosset v. Howard*, 1847.

³ *Gosset v. Howard*, 1847; citing *Countess of Rutland's case*, 1605, and *Parsons v. Loyd*, 1772.

⁴ *Id.* See the elaborate judgment of Ex. Ch. in *Gosset v. Howard*, 1847.

⁵ Gr. Ev. § 12, as to one or two lines.

⁶ *Brenan's case*, 1847 (*Ld. Denman*); *Robertson v. Struth*, 1843 (*Patteson, J.*).

clusively presumed to have taken place at the earliest period of the day on which they were done, so that a judgment is regular though signed several hours after the defendant had died,¹—provided only this doctrine does not work injustice in any particular case;² and with the further limitation that it does not apply to the issuing of a writ of summons, since, if it did, a plaintiff could not commence legal proceedings till the day after the cause of action had accrued, and the defendant in the meanwhile might escape out of the jurisdiction.² The *records* of a court of justice, and indeed all records, must again always be presumed to have been correctly made;³ so that no evidence will be admissible to show that a charter granted by the Crown was made or delivered at another time than when it bears date;⁴ while the day specified in a record of conviction will be conclusive proof of the commission day of the assizes at which the trial took place,⁵—though (as in the case just mentioned), the court will, where it is necessary to do so, in order to prevent justice being defeated,⁶ allow the party against whom the record is produced to show by parol evidence the actual day of trial, and will judicially notice that though by fiction of law the whole time of the assizes is only one legal day, yet that this legal day may consist of many natural days, and thus prevent justice from being defeated by a mere arbitrary rule;⁶ and will on production of a *Nisi Prius* record containing two counts, on distinct causes of action, admit parol evidence to show that on a verdict entered as awarding damages to the plaintiff generally, that the substantial damages were recovered on one count only.⁷ In these two last-named cases proof of the real facts would not *contradict* the record, but merely *explain it*. On the principle, too, that every presumption necessary to sustain a record will be made, it will after verdict, whether in a civil or a criminal case,⁸ be presumed that those

¹ Wright *v.* Mills, 1859; Edwards *v.* R., 1854.

² Clarke *v.* Bradlaugh, 1881.

³ Reed *v.* Jackson, 1801; Ramsbottom *v.* Buckhurst, 1814 (Ld. Ellenborough); R. *v.* Carlile, 1832 (Ld. Tenterden). “Res judicata pro veritate accipitur.” Dig. lib. 50, t. 17, l. 207.

⁴ Ludford *v.* Gretton, 1576.

⁵ See Thomas *v.* Ansley, 1806; R. *v.* Page, 1788.

⁶ Whitaker *v.* Wisbey, 1852; Roe *v.* Hersey, 1771.

⁷ Preston *v.* Peeke, 1858.

⁸ R. *v.* Waters, 1848; R. *v.* Bowen, 1849; Heymann *v.* R., 1873; R. *v.* Goldsmith, 1873; R. *v.* Aspinall, 1876.

facts, without proof of which the verdict could not have been found, were proved, though they are not distinctly alleged in the record; provided such record contains terms sufficiently general to comprehend them in reasonable intendment.¹ In other words, the verdict will cure any *defective* statement, though it will not cure the *omission* of any material averment.² It is, again, always a presumption of law that the notes taken by the judge at Nisi Prius are correct, and no party is allowed to raise any question respecting the rejection of evidence at the trial, unless it appears from these notes that the evidence was formally tendered.³

§ 86. A conclusive presumption in favour of an act is sometimes raised by the solemnity with which it was done, though it was not done in court. Thus, where an award professes to be made *de præmissis*, the presumption is that the arbitrator intended to dispose finally of all matters in difference, and if by any intendment it can be made so, his award will be held final;⁴ a bond, or other specialty, is, so long as it remains unimpeached,⁵ presumed to have been made upon good consideration, and for the consideration stated on it.⁶ And, by an Act of the present reign,⁷ “every bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person *signing the same*,⁸ notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same, that the goods had not been in fact taken on board; provided that the master or other person so signing may exonerate himself in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or of some

¹ Jackson *v.* Pesked, 1813 (Lord Ellenborough); Spieres *v.* Parker, 1786; Davis *v.* Black, 1841 (Ld. Denman, C.J., and Patteson, J.); Harris *v.* Goodwyn, 1841; Goldthorpe *v.* Hardman, 1845. See, also, Smith *v.* Keating, 1849; Kidgill *v.* Moor, 1850; and Ld. Delamere *v.* The Queen, 1867.

² Bradlaugh *v.* R., 1878, C. A.

³ Gibbs *v.* Pike, 1842 (Ld. Abinger,

and Alderson, B.).

⁴ Harrison *v.* Creswick, 1853; Jewell *v.* Christie, 1867.

⁵ Lowe *v.* Peers, 1768; Story, Bills, § 16. See post, § 148.

⁶ Barton *v.* Bank of New South Wales, 1890 (P. C.).

⁷ 18 & 19 V. c. 111 (“The Bills of Lading Act, 1855”), § 3.

⁸ See Meyer *v.* Dresser, 1864; Jessel *v.* Bath, 1867.

person under whom the holder claims." Again, it is by statute enacted that every conveyance made under the Act for facilitating the sale and transfer of land in Ireland shall be "for all purposes conclusive evidence" that all previous proceedings leading to such conveyance have been regularly taken;¹ and that every declaration of title by the Landed Estates Court shall be as conclusive upon the rights of all parties as any such deed of conveyance.²

§ 86A. Again, when (as is now often the case) the contract is made by one party delivering to the other a document, in a common form containing the proposed terms, if the form is accepted without objection, the acceptor is presumed to have agreed to its terms, and is bound by the contents, whether he has or not in fact read the document.³ Exceptions to this rule exist, however—1st, where from the nature of the transaction the person accepting the document may reasonably suppose that it contains no special terms; 2nd, where the terms are printed in a mode calculated to mislead; and 3rd, where the terms or conditions are in themselves unreasonable or irrelevant.³

§ 87.⁴ Another conclusive presumption made by the law, is that in favour of the due execution of *ancient deeds and wills*. When these instruments are thirty years old, and are unblemished by any alterations, they (as it is said) prove themselves; their bare production is sufficient, and the subscribing witnesses are conclusively taken to be dead. This presumption,—so far as the present rule of evidence is concerned,—is not affected by proof that the witnesses are living,⁵ and, it seems, even actually in court;⁶ nor, in the case of wills, by showing that the testator died within the thirty years.⁷ But it must appear that the instrument comes from custody, which (even though it is not in point of law strictly proper), affords a reasonable presumption in favour of its genuine-

¹ 21 & 22 V. c. 72 ("The Landed Estates Court (Ireland) Act, 1858"), § 85, Ir. See *Power v. Reeves*, 1864 (H. L.); *In re Tottenham's Estate*, 1867.

² 21 & 22 V. c. 72, § 51, Ir.; *Billing v. Welch*, 1871 (Ir.).

³ *Watkins v. Rymill*, 1883, and cases there cited.

⁴ Gr. Ev. § 21, in great part.

⁵ *Doe v. Burdett*, 1836.

⁶ Per *Yates, J.*, as cited (*Ld. Kenyon*) in *Marsh v. Collnett*, 1798.

⁷ *Doe v. Wolley*, 1828. In *Jackson v. Blanshan*, 1808 (Am.), the Sup. Ct. of New York held that the thirty years must be computed from the testator's death.

ness;¹ and that it is otherwise free from just ground of suspicion.² It is not altogether clear whether, if the deed be a conveyance of real estate, the party is bound first to show some acts of possession under it; but the weight of opinion seems to be in the negative, as will hereafter be more fully explained.³ It also is questionable whether the rule applies to an instrument bearing the seal of a court or a corporation; "because, although the witnesses to a private deed, or persons acquainted with a private seal, may be supposed to be dead, or not capable of being accounted for after such a lapse of time, yet the seals of courts and corporations, being of a permanent character, may be proved by persons at any distance of time from the date of the instrument to which they are affixed."⁴

§ 88. The presumption in their favour, if they come from the proper custody, and purport to be thirty years old, is not confined to deeds and wills, but extends equally to *letters*,⁵ *entries*,⁶ *receipts*,⁷ *settlement certificates*,⁸ and indeed to all other written documents; and in such cases the signatures and handwriting need not be proved. The rule is founded "on the great difficulty, nay, impossibility, of proving the handwriting of the party after such a lapse of time."⁹

§ 89.¹⁰ *Estoppels* may be ranked among the class of irrebuttable presumptions.¹¹ A man is estopped, when he has done or permitted some act, which the law will not allow him to gainsay. "The law of estoppel is not so unjust or absurd, as it has been too much the custom to represent."¹² Its foundation rests partly on the obligation to speak and act in accordance with truth, by which every honest man is bound, and partly on the policy of the law, which thus seeks to prevent the mischiefs that would inevitably result

¹ Doe v. Samples, 1838; Bishop of Meath v. M. of Winchester, 1836 (Tindal, C.J., representing all the judges in Dom. Proc.).

² Roe v. Rawlings, 1815.

³ See Malcolmson v. O'Dea, 1862 (H. L.), cited post, §§ 665, 666.

⁴ R. v. Bathwick, 1832 (Ld. Tenterden, C.J.).

⁵ Doe v. Beynon, 1840; Bere v. Ward, 1821 (Dallas, C.J.); and 1823 (Ld. Tenterden, C.J.).

⁶ Per cur. in Wynne v. Tyrwhitt,

1833.

⁷ Bertie v. Beaumont, 1816.

⁸ R. v. Ryton, 1792; R. v. Netherthong, 1813. In these cases no proof of the custody was given in evidence, but the court held this to be immaterial.

⁹ Wynne v. Tyrwhitt, 1821.

¹⁰ Gr. Ev. § 22, in part.

¹¹ By the N. York Civ. Code, § 1792, estoppels are abolished.

¹² Per Taunton, J., in Bowman v. Taylor, 1834.

from uncertainty, confusion, and want of confidence, were men permitted to deny what they had deliberately asserted. The doctrine of estoppel is, however, guarded with great strictness, or, as it is said, "estoppels are odious." The reason for this is not because the party enforcing the estoppel is presumed to be desirous of excluding the truth; indeed, the more reasonable supposition is that that which the opposite party has already solemnly admitted to be so really is the truth; but because the estoppel *may* exclude the truth. It consequently is required that all estoppels must be certain to every intent; for no one shall be prevented from setting up the truth, unless it be in plain contradiction to allegations and acts previously made in his interest.¹

§ 90. From these last words it will be gathered that a man is estopped not only by his own allegations and acts, but also by those of *all persons through whom he claims*.² In technical language, *estoppels* are usually *binding upon both parties and privies*.³ Lord Coke divides privies into three classes; first, privies in blood, as heirs; secondly, privies by estate, as feoffees, lessees, assignees, &c.; and thirdly, privies in law, "as the lord by escheat, the tenant by the courtesy, the tenant in dower, the incumbent of a benefice,"⁴ husbands suing or defending in right of their wives,⁵ executors and administrators.⁶ Upon the principle *qui sentit commodum, sentire debet et onus*, the privy stands in no better position than the party through whom he derives his title; and if the latter is not at liberty to contradict what he has formerly said or done, the former is subject to a like disability.⁷ An exception to this rule is admitted in favour of those privies, who would themselves be aggrieved or defrauded by the conduct of the party through whom they claim. For instance, where a man executes a deed with the fraudulent intent of defeating the statutes of mortmain, his heir-at-law is not estopped from questioning the validity of the inden-

¹ *Bowman v. Taylor*, 1835 (Lord Denman and Taunton, J.); *Lainson v. Tremere*, 1834; *Kepp v. Wiggett*, 1851 (Williams, J.); *Pelletreau v. Jackson*, 1833 (Am.); *Carver v. Jackson*, 1830 (Am.).

² B. N. P. 233.

³ See post, §§ 787—793, as to admissions by privies.

⁴ Co. Litt. 352 a.

⁵ *Outram v. Morewood*, 1814.

⁶ *R. v. Hebden*, 1738.

⁷ *Taylor v. Needham*, 1811.

ture, since his claim to the lands is founded, not on the deed, but on his title by descent.¹

§ 91. There are three classes of estoppels; namely, estoppels by matter of record, estoppels by deed, and estoppels *in pais*.² Judgments³ are the most extensive species of records, and consequently estoppels by record will be most conveniently discussed in treating of judgments. Neither an estoppel by record nor one by deed will operate as a *conclusive* estoppel, unless the matter of estoppel appears on the record,⁴ nor unless it has been *expressly pleaded* by way of estoppel where an opportunity of so pleading it has been afforded.⁵ If a party, having an opportunity of pleading an estoppel, does not avail himself of it, the court will conclusively presume that he has intended to waive all benefit derivable from it, and allow the jury to form their own conclusions from the facts presented to them in evidence.⁶ If, indeed, no opportunity for pleading the matter of estoppel in bar has arisen, an estoppel by record or by deed ought, on principle, to be binding when offered in evidence; and this has been held to be the law in some of the United States,⁷ though the point has not yet been expressly decided in this country.⁸ In pleading, an estoppel can only be met by the pleading which is now equivalent to the old demurrer.⁹

§ 92. As a general rule, however, estoppels *in pais* need not be pleaded in order to make them obligatory. For instance, if a man represent another as his agent, in order to procure a person to contract with him as such, and this person so contract, the contract

¹ Doe v. Lloyd, 1839. See Smyth v. Wilson, 1841 (Ir.).

² Co. Litt. 352 a; 2 Smith, L. C. 657.

³ See post, §§ 1667 et seq.

⁴ See Robinson v. Robinson, 1879.

⁵ 2 Smith, L. C. 670, 674, and 683. The whole note, from pp. 656 to 726, should be perused. It contains an elaborate exposition of a very difficult branch of the law. See also Trevivan v. Lawrence, 1704; Magrath v. Hardy, 1838.

⁶ Outram v. Morewood, 1814; Vooght v. Winch, 1832; Doe v. Huddart, 1835; Doe v. Seaton, 1835 (Parke, B.); Nowlan v. Gibson, 1847 (Ir.); Matthew v. Osborne, 1855; Doe v. Wright, 1839; Magrath v. Hardy,

1838, as to estoppels by matter of record; Wilson v. Butler, 1838; Bowman v. Rostron, 1835; Young v. Raincock, 1847; Carpenter v. Buller, 1841; Potts v. Nixon, 1870 (Ir.), as to estoppels by deed; and Freeman v. Cooke, 1848 (Parke, B.), as to both kinds of estoppel.

⁷ See Howard v. Mitchell, 1817 (Am.); Adams v. Barnes, 1821 (Am.).

⁸ R. v. Blakemore, 1852. See R. v. Haughton, 1853; Ld. Feversham v. Emerson, 1856; and R. v. Hutchins, 1880, reversed (on another point) in C. A., 1881.

⁹ R. S. C. 1883, Ord. XXV. rr. 1-2; see, also, Bradley v. Beckett, 1844.

binds the principal equally with one made by himself, and no form of pleading can leave such a matter at large, or enable the jury to treat it as no contract;¹ and in an action by indorsee against acceptor on a bill payable to drawer's order, to a plea that the drawer had no authority to indorse, plaintiff, though he might reply the estoppel,² would not be forced to do so, but he might by his pleading raise the point of law, that the defence disclosed no legal answer to the action.³

§ 93. A party is not, however, estopped by his own deed where he can make it void by proving that it was executed for a fraudulent, illegal, or immoral purpose. In one case,⁴ indeed, where a man, in order to give his brother a colourable qualification to kill game, had conveyed some lands to him, it was held that the grantor's widow could not avoid this conveyance in an action of ejectment against her by the brother. But although Sir Nicholas Tindal attempted to support this decision as resting on the fact, that "the defence set up was *inconsistent* with the deed,"⁵ it can, even on this ground, scarcely be supported. Modern decisions have established that in an action of ejectment by the grantee of an annuity, to recover premises on which it was secured, the grantor may show that the premises were of less value than the annuity, and that the deed, consequently, required enrolment, notwithstanding that he had expressly covenanted in the deed that the premises were of greater value;⁶ and that where a bond has been given, or a covenant made, for an illegal consideration, the obligor or covenantor may avoid the instrument by pleading and proving the

¹ *Freeman v. Cooke*, 1848 (Parke, B.).

² *Sanderson v. Collman*, 1843.

³ *Hallifax v. Lyle*, 1849.

⁴ *Doe v. Roberts*, 1832. See also *Phillpotts v. Phillpotts*, 1851.

⁵ *Prole v. Wiggins*, 1837.

⁶ *Doe v. Ford*, 1835, where a question was raised whether a covenant, under any circumstances, is such a declaration as to estop a party from afterwards disputing the fact covenanted for, but the point was left undecided. In America a party may, in some cases, be estopped by a covenant. Thus a covenant of warranty estops the grantor from setting

up an after-acquired title against the grantee, for it is a perpetually operating covenant: *Terrett v. Taylor*, 1815 (Am.); *Jackson v. Matsdorf*, 1814 (Am.); *Jackson v. Wright*, 1817 (Am.); *M'Williams v. Nisby*, 1816 (Am.); *Somes v. Skinner*, 1825 (Am.). But a grantor is not estopped by a covenant, that he is seised in fee and has good right to convey; *Allen v. Sayward*, 1828 (Am.); for any seisin in fact, though by wrong, is sufficient to satisfy this covenant, its import being merely this, that he has the seisin in fact, at the time of conveyance, and thereby is qualified to transfer the estate to the grantee.

illegality;¹ and this too, though a legal, but untrue, consideration is stated on the face of the deed.² Indeed, where both parties to an indenture either know, or have the means of knowing, that it is executed for an immoral purpose, or in contravention of a statute, or of public policy, in general neither will be estopped from proving facts which render the instrument void ab initio.³ For although a party will thus, in certain cases, be enabled to take advantage of his own wrong,⁴ yet this evil is trifling in comparison with the flagrant evasion of the law, that would result from an opposite rule.⁵ Neither will a party be estopped by his deed, if he executed it while, from duress, infancy, or other cause, he was incapable of making a valid contract, or if he was deceived by the fraudulent misrepresentations or acts of other parties.⁶

§ 94. The doctrine at one time prevailed⁷ that trustees acting for the benefit of the public could never be estopped from disputing the validity of their deeds, because, if they were, the innocent parties, on whose behalf they were acting, might be seriously injured.⁷ The doctrine now, however, only holds good in cases in which the trustees have, in their dealings with another party, violated a public statute, the contents of which are presumed to be known to such party. Therefore, where a bridge Act authorised commissioners to mortgage the tolls, and enacted that the mortgagees should have no preference by reason of priority, it was held in an action of ejectment brought by a mortgagee of the tolls against the commissioners, that the defendants were estopped from setting up the fact of an earlier mortgage to defeat the legal estate of the lessor of the plaintiffs.⁸

§ 95. Though an estoppel may bind a person acting in one capacity, it does not necessarily follow that it will have a similar effect

¹ *Prole v. Wiggins*, 1837; *Collins v. Blantern*, 1767; *Gas Light and Coke Co. v. Turner*, 1839; *affd. in Ex. Ch.*, 1840; *Stratford and Moreton Ry. Co. v. Stratton*, 1832; *Hill v. Manch. Waterw. Co.*, 1831; *Benyon v. Nettlefold*, 1850; *Horton v. Westm. Improve. Comrs.*, 1852.

² *Paxton v. Popham*, 1814.

³ *Id.*

⁴ *Doe v. Ford*, 1835 (*Ld. Denman*);

Doe v. Howells, 1832.

⁵ *Benyon v. Nettlefold*, 1850. See *Mallalieu v. Hodgson*, 1852; *Bowes v. Foster*, 1858; *Taylor v. Bowers*, 1877.

⁶ *Hayne v. Maltby*, 1789.

⁷ *Fairtitle v. Gilbert*, 1787; *Doe v. Hares*, 1833 (*Littledale, J.*).

⁸ *Doe v. Horne*, 1843; *R. v. White*, 1843; *Horton v. Westm. Improve. Comrs.*, 1852.

when he is sustaining a totally different character.¹ For instance, an executor de son tort, who has verbally agreed with the landlord to deliver up demised premises, but has afterwards taken out letters of administration, is not concluded from bringing an action of ejectment against the landlord, who has actually obtained possession under the agreement.² Where, however, “an heir apparent, having only the hope of succession, conveys, during the life of his ancestor, an estate, which afterwards descends upon him, although nothing passes at that time, yet, when the inheritance descends upon him, he is estopped to say that he had no interest at the time of the grant.”³ The distinction between these two cases is, that in the former, the party not estopped was acting for the benefit of others; in the latter, the party estopped was *sui juris*, and acting on his own behalf.

§ 96. A deed does not estop a party from disputing the correctness of that which is not an essential averment thereon, but is *mere description*—such, for instance, as the date of the deed; the quantity of land; its nature, whether arable or meadow; and the like—for these statements are but incidental and collateral, and may be supposed not to have received the deliberate attention of the parties.⁴ In this country, however, if a deed of conveyance distinctly states in the operative part that the consideration money has been received, and the estoppel is properly pleaded,⁵ the fact of payment, and the amount paid, are conclusively presumed.⁶ The Conveyancing and Law of Property Act, 1881,⁷ has expressly enacted that this (which appears to have been so long before the Act) shall be so in favour of a subsequent innocent purchaser. Under

¹ 2 Smith, L. C. 667; Robinson's case, 1603; Smyth v. Wilson, 1841 (Ir.); Leggott v. Gt. N. Ry. Co., 1876. See Bennett v. Gamgee, 1877, C. A.

² Doe v. Glenn, 1834. See also Middleton's case, 1603; Metters v. Brown, 1862; Lyons v. Mulderry, 1832 (Ir.); Kirwan v. Gorman, 1846 (Ir.); Johnson v. Warwick, 1856.

³ Hayne v. Maltby, 1789 (Ld. Kenyon).

⁴ Com. Di. Estoppel, A. 2; Yelv. 227, by Metcalfe, n. 1; Doddington's

case, 1594; Shipworth v. Green, 1725

⁵ Potts v. Nixon, 1870 (Ir.).

⁶ Shelly v. Wright, 1737; Cossens v. Cossens, 1737; Rowntree v. Jacob, 1809, in which last case there were highly suspicious circumstances tending to show that the consideration money had not in fact been paid; Baker v. Dewey, 1823; Lampon v. Corke, 1834; Hill v. Manch. Waterw. Co., 1832. See Smith v. Battams, 1857; also Gresley v. Mousley, 1861.

⁷ 44 & 45 V. c. 41, § 55.

the same Act,¹ the production by a solicitor of a deed with a receipt in the body thereof or indorsed upon it for the consideration is sufficient authority for the payment of the consideration to him, although a receipt indorsed upon the deed will not in itself amount to an estoppel.² In America,³ though the party is estopped from denying the conveyance, and that it was for a valuable consideration, the statement in the deed is apparently only *primâ facie* evidence of the amount paid.⁴

§ 97. Lord Coke's doctrine that "a recital doth not conclude, because it is no direct affirmation,"⁵ has been expressly overruled. The law now is⁶ thus: "If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound⁷ to deny the recital, notwithstanding what Lord Coke says on the matter of recital in Coke Littleton, 352 b; and a recital in instruments not under seal may be such as to be conclusive to the same extent. A strong instance as to a recital in a deed, is found in a case⁸ where, in a bond to secure the payment of rent under a lease stated, it was recited that the lease was at a rent of 170*l.*, and the defendant was estopped from pleading that it was 140*l.* only, and that such amount had been paid. So, where other *particular* facts are mentioned in a condition to a bond, as that the obligor and his wife should appear, the obligor cannot plead that he appeared himself, and deny that he is married, in an action on the bond.⁹ All the instances given

¹ 44 & 45 V. c. 41, § 56.

² *Lampon v. Corke*, 1834 (Holroyd, J., Best, J.); *Straton v. Rastall*, 1788.

³ Gr. Ev. § 26, n., almost verbatim.

⁴ The principal cases will be found referred to in the early editions of this Work.

⁵ Co. Lit. 352 b. As to the effect of recitals in a deed which has been tendered for execution but not executed, see *Bulley v. Bulley*, 1875.

⁶ Per Parke, B., in *Carpenter v. Buller*, 1841. As to other cases where a recital has been held conclusive, see *Bowman v. Taylor*, 1835; *Hills v. Laming*, 1854; *Lainson v. Tremere*,

1834; *R. v. Stamper*, 1841; *Hill v. Manch. Waterw. Co.*, 1831; *Pargeter v. Harris*, 1845; *Clarke v. Hall*, 1889 (Ir.). See also *Bayley v. Bradley*, 1848; *Young v. Raincock*, 1847; *Horton v. Westm. Improve. Comrs.*, 1852; and *Hungerford v. Beecher*, 1855 (Ir.). But see *Lindsay v. E. of Wicklow*, 1873 (Ir.).

⁷ Even though she be a married woman, *semble* (Ld. J. James), *Jones v. Frost*, in re *Fiddey*, 1872.

⁸ *Lainson v. Tremere*, 1834. See *Brooke v. Haymes*, 1868.

⁹ 1 Roll. Abr. 873, c. 25.

in Com. Dig., Estoppel, A. 2, under the head of 'Estoppel by Matter of Writing' (except one which relates to a release), are cases of estoppel in actions on the instrument in which the admissions are contained. By his contract in the instrument itself a party is assuredly bound, and must fulfil it. But there is no authority to show that a party to the instrument would be estopped, in an action by the other party, not founded on the deed, and *wholly collateral* to it,¹ to dispute the facts so admitted, though the recitals would certainly be evidence; for instance, in another suit, though between the same parties, where a question should arise whether the plaintiff held at a rent of 170*l.* in the one case, or was married in the other case, it could not be held that the recitals in the bond were conclusive evidence of these facts. Still less could it be so held, if the matter alleged in the instrument were wholly immaterial to the contract therein contained; as, for instance, suppose an indenture or bond to contain an unnecessary description of one of the parties as assignee of a bankrupt, overseer of the poor, or as filling any other character, it could not be contended that such statement would be conclusive on the other party, in any other proceeding between them."

§ 98. To make a recital operate as an estoppel, there must then be, first, a distinct statement² of some material³ particular⁴ fact; secondly, a contract made with reference to such statement;⁵ and, thirdly, either an action directly founded on the instrument containing the recital, or one which is brought to enforce the rights arising out of such instrument.⁶ If these requisites are satisfied,

¹ See *S.-East. Ry. Co. v. Warton*, 1862.

² See *Kepp v. Wiggett*, 1851.

³ In *Carpenter v. Buller*, 1841, the court were strongly inclined to think that, in a deed relating to an adit, a recital that certain neighbouring lands, through which the adit did not pass, belonged to A. B., was an immaterial matter, which a party to the deed was not estopped from denying. The point, however, was not directly decided, as the admission was held inconclusive on other grounds.

⁴ As to the distinction between generality and particularity, see Com. Dig., Estoppel, A. 2, and notes to

Rainsford v. Smyth, 1561.

⁵ In *Stronghill v. Buck*, 1850, the court thus stated the law:—"Where a recital is intended to be a statement, which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But where it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument." See, also, *Young v. Raincock*, 1847; *Blackhall v. Gibson*, 1878 (Ir.).

⁶ *Wiles v. Woodward*, 1851; *Carter v. Carter*, 1858 (Wood, V.-C.); *Fraser v. Pendlebury*, 1862.

the doctrine may, in some cases, be extended to instruments not under seal. In all cases of estoppel by recital, the matter recited requires no proof; since the recital is not offered as secondary, but as primary evidence, which cannot be controverted, and which forms a muniment of title. This rule, however, only applies to so much of a deed as is *actually recited*; and therefore if it becomes necessary to rely on a part of the recited deed which is not itself recited, such recited deed must be produced and proved in the regular way.¹

§ 99. It is a rule in the general doctrine of estoppels, that every estoppel must be *reciprocal*; that is, it must bind both parties, since a stranger can neither take advantage of an estoppel, nor be bound by it.² For example, where a party, holding chambers in Lincoln's Inn as tenant-at-will under the benchers, in a deed, by which he conveyed his interest to A., recited that he was seised of them for life, and subsequently surrendered them to the benchers, who admitted B. as tenant, it was held that B. was, as against A., not estopped from denying that the surrenderor was seised for life;³ again, where a man took lands from the assignees of a bankrupt, by a deed describing such lands as freehold, he was held not estopped, as against the bankrupt's wife (on a claim by her of dower), from proving that the lands were in fact leasehold;⁴ in an action against an individual for using a way,⁵ plaintiff's conviction on a previous indictment, in respect of the same way, for obstructing a public highway, though doubtless strong evidence, cannot be used as an estoppel; while the grantee or lessee under a deed poll if he claim title under it (although not, in general, estopped from gainsaying anything mentioned in the deed which is the deed of the grantor or lessor only) is thereby estopped from denying title of the grantor.⁶ Indeed, as against the grantor under such a deed poll an exception to the general rule requiring reciprocity in estoppels might perhaps be recognised, because in these instruments only one party is ever intended to be bound, and as he has executed a deed with the same solemnities as an indenture, there is no

¹ Abbott v. Gillett, 1838.

² Co. Lit. 352 a.

³ Doe v. Errington, 1840.

⁴ Gaunt v. Wainman, 1836.

⁵ Petrie v. Nuttall, 1855.

⁶ Co. Lit. 363 b; Goddard's case, 1584.

valid reason why the doctrine of estoppel should not apply to him.¹

§ 100. Another rule with respect to estoppels by deed is that a deed which can take effect *by interest* shall not be construed to take effect by estoppel.² Therefore if a lessor has any interest in the demised premises, even though it be one less than he professes to grant, the lease shall not work by estoppel, but shall enure to the extent of the lessor's interest, and no further.³ If, however, a person, having no title whatever, makes a lease by indenture, this will estop the parties to the deed from alleging the lessor's want of title during the continuance of the lease; and if the lessor subsequently purchases the land, or otherwise obtains an interest in it, the lease, which was originally a lease by *estoppel*, will be converted into a lease *in interest*, and the heir or assignee of the lessor will be bound thereby, as well as the lessee and his assignees.⁴

§ 101. The third kind of estoppels are estoppels by *matter in pais*.⁵ The most ordinary instance of these is the well-established rule, that a tenant, during his possession of premises, shall not deny that a landlord, under whom he entered, or from whom he has taken a renewal of his holding,⁶ or to whom he has paid rent, had title at such time.⁷ Neither in an ejectment by the landlord, nor in an action by him for rent or for use and occupation, can the tenant set up the superior title of a third person,⁸ or that the landlord has no title. For instance, if the plaintiff be an incumbent, the tenant cannot give evidence that his presentation was simoniacal;⁹ if he be a devisee he will not be allowed to prove that the deviser was incapable of making a will¹⁰ (unless, indeed, the party claiming as devisee was guilty of fraud in making the will, and in falsely representing it to him as a valid one).¹¹ The only course

¹ 2 Smith, L. C. 660; Bac. Abr. tit. Leases, O.

² Doe v. Barton, 1840 (Patteson, J.).

³ Id. in argument; Co. Lit. 45 a, 47 b; Doe v. Seaton, 1835 (Parke, B.); Walton v. Waterhouse, 1672.

⁴ Webb v. Austin, 1844; Sturgeon v. Wingfield, 1846.

⁵ As to "judicial admissions," and "admissions acted upon," which sometimes are classed among estop-

pels in pais, see post, §§ 772, 783, 820 et seq., 839 et seq.

⁶ Doe v. Wiggins, 1843.

⁷ Doe v. Pegge, 1787 (Ld. Mansfield); Doe v. Barton, 1840. See Att.-Gen. v. Stephens, 1855.

⁸ Doe v. Pegge, 1787 (Ld. Mansfield).

⁹ Cooke v. Loxley, 1792.

¹⁰ Doe v. Wiggins, 1843.

¹¹ Ld. Denman, in Id.

which a tenant who wishes to dispute the title of the landlord under whom he entered can pursue (save indeed in the one case of his being able to show that his admission of being tenant was obtained by a clear fraud) is to yield up the premises, and then bring an action to recover them.¹ So strict is this rule, that, even if a landlord, in proving his own case, disclose the fact that he has only an equitable or a joint estate in the premises, the tenant cannot avail himself of that circumstance as a defence.² Further examples of the rule are, that a lessee, who has once accepted a lease and paid rent under it, cannot dispute the lessor's title, though the deed itself admits upon its face some infirmity in that title,³ and that a tenant who has held premises under a corporation aggregate, and paid rent, cannot object to such corporation suing him for use and occupation, on the ground that a corporation cannot demise except by deed, and that he has occupied without deed.⁴ The rule that a tenant cannot deny his landlord's title is applicable in an action of trespass, as well as in one to recover land;⁵ and is binding, not only on the tenant himself, but on all who claim in any way through him,⁶ as, for instance, a party to whom a lessee has given up possession.⁷ Its principle, moreover, extends to the case of a person coming in by permission as a mere lodger, a servant, or other licensee.⁸

§ 102. But though a tenant cannot deny that the person, by whom he was let into possession, had title at the time when he so let him in, he may show that such person had no title at some previous time. For instance, where the defendant claimed under a conveyance from a certain company, dated in 1824, he was allowed

¹ Per Coleridge, J., in *Id.* 377; *Doe v. Lady Smythe*, 1815. See R. S. C. 1883, Ord. XVIII. r. 2; App. C. § 7.

² *Dolby v. Iles*, 1840.

³ *Duke v. Ashby*, 1862; *Morton v. Woods*, 1868.

⁴ *May, of Stafford v. Till*, 1829; *Dean and Ch. of Rochester v. Pierce*, 1808; recognised in *Fishmongers' Co. v. Robertson*, 1843. See *Eccles. Commis. v. Merral*, 1869; also post, § 984.

⁵ *Delaney v. Fox*, 1857; qualifying a dictum of Pollock, C.B., in

Watson v. Lane, 1856. See also *Ward v. Ryan*, 1875.

⁶ *Lond. & N. West. Ry. Co. v. West*, 1867.

⁷ *Doe v. Mills*, 1835; *Doe v. Lady Smythe*, 1817; *Taylor v. Needham*, 1809.

⁸ *Doe v. Baytup*, 1835, where a woman who had asked leave to get vegetables in the garden, and obtained the keys for this purpose, fraudulently took possession of the house and tried (unsuccessfully, of course) to set up a title. See also *Doe v. Birchmore*, 1839.

to dispute the title of the company to convey the same premises to the plaintiff in 1818;¹ a lessee let into possession in 1826 under a demise from a tenant for life, was allowed, in an action brought by the reversioner (though he would not have been permitted to show after the death of the tenant for life adverse title in another *at the date* of the lease), to prove that, *before* 1826, the legal estate was outstanding in a third party, and that, consequently, the reversioner, who claimed in common with the tenant for life under a settlement of a much earlier date, had no legal title.² A tenant is also allowed to prove that, since the commencement of the tenancy, the title of his lessor has expired or been defeated.³ For example, he may prove that his landlord was a tenant *pour autre vie*, and that the *cestui que vie* is dead; or that he was a tenant from year to year or at will, and that the superior landlord had given him a notice to quit or determined the will;⁴ or that the person who let him in was a mortgagor in possession, who, not having up to the date of demise been treated as a trespasser, had then title to confer the legal possession, but has subsequently been treated as a trespasser.⁵ In short, the tenant may rely on any fact which either amounts to an eviction by title paramount,⁶ or shows that the title of his landlord has expired.⁷

§ 103. It is not always clear what constitutes a "letting into possession." Where a party was in possession of premises without leave obtained from any one, and a person came to him and said, "You have no right to the premises," upon which he acquiesced, and took a lease from this person, the relation of landlord and tenant was held to be sufficiently created to debar the one from

¹ Doe v. Powell, 1834.

² Doe v. Langdon, 1848; Doe v. Whitroe, 1822.

³ Doe v. Barton, 1840 (Ld. Denman); Hopcraft v. Keys, 1833. See Bayley v. Bradley, 1847; Watson v. Lane, 1856; Langford v. Selmes, 1857; Howe v. Scarrott, 1859; Lond. & N. West. Ry. Co. v. West, 1867.

⁴ Doe v. Barton, 1840.

⁵ Doe v. Barton, *supra*. A mortgagee, by simply giving notice to the tenant to pay rent to him, does not treat the mortgagor as a trespasser: Hickman v. Machin, 1859; but a

notice, to have such an effect, must either be coupled with an attornment, or be followed by actual payment of rent, to the mortgagee. See *id.*; also Wilton v. Dunn, 1851; Turner v. Cameron's Coalbrook St. Coal Co., 1850; Litchfield v. Ready, 1850; Trent v. Hunt, 1853.

⁶ Gouldsworth v. Knights, 1843.

⁷ Downs v. Cooper, 1841. See Doe v. Watson, 1817; Doe v. Seaton, 1836; Claridge v. Mackenzie, 1842; Mountney v. Collier, 1853; Emery v. Barnett, 1858; Delmege v. Mullins, 1875, Ex. Ch.

disputing the title of the other.¹ But where a tenant, already in possession of premises under a demise from a termor, at the expiration of the termor's right entered into a parol agreement with another party to hold under him, in ignorance of the real facts, and under the supposition that this party was entitled to the premises, this agreement was held not to be equivalent to the first letting into possession.² Neither a parol agreement by a tenant to hold of a party, by whom he was *not let into possession*,³ nor an attornment,⁴ nor an actual payment of rent to such party, even under a distress,⁵ will in themselves operate as estoppels; but the tenant may still show that he has acted in ignorance, or under a misapprehension of the real circumstances,⁶ or, in the case of payment of rent, that some other party was entitled to receive it.⁷

§ 104.⁸ There are also certain conclusive presumptions of law with respect to *infants*.⁹ Thus, an infant under seven is conclusively presumed incapable of committing any felony, or, indeed, any indictable offence,¹⁰ for want of discretion;¹¹ a male infant under fourteen is presumed incapable, on the ground of impotency, of committing a rape as a principal in the first degree,¹² or of being

¹ Doe v. Mills, 1835 (Patteson, J.). See also Dolby v. Iles, 1840.

² Claridge v. Mackenzie, 1842. "There was no *new* possession given by the defendant; she was in no way prejudiced; she could not have turned the plaintiff out of possession; and before their agreement, if she had brought her ejectment, the plaintiff might have shown that she had no title, and that the title was in some one else. It is not like the case of a person letting another into possession of vacant premises; it is in fact a remaining in possession of premises, which had been formerly occupied by the tenant." Per Tindal, C.J.

³ Id.

⁴ Doe v. Brown, 1837.

⁵ Knight v. Cox, 1856.

⁶ Gregory v. Doidge, 1827; Gravener v. Woodhouse, 1824; Rogers v. Pitcher, 1818; Doe v. Barton, 1840; Hall v. Butler, 1839 (Patteson, J.).

⁷ Cooper v. Blandy, 1839; Doe v. Francis, 1837; in which case payment of rent being the only evidence

of tenancy, Patteson, J. allowed the defendant to show, that the lessor of the plaintiff had acted as the agent of third parties. See Hitchings v. Thompson, 1850, explained by Ld. Cranworth, C., in Att.-Gen. v. Stephens, 1855.

⁸ Gr. Ev. § 28, in part.

⁹ In all civil questions where the rights of parents depend on the birth of a living child, the Scotch law conclusively presumes that the child was not born alive, if it was not heard to cry. 1 Dickinson, Ev. 180.

¹⁰ 42 & 43 V. c. 49 ("The Summary Jurisdiction Act, 1879"), § 10, sub-s. 5.

¹¹ 4 Bl. Com. 23; 1 Hale, 27. If an infant under seven is given into custody on a charge of felony, an action for false imprisonment will lie; Marsh v. Loader, 1863.

¹² 1 Hale, 630; 1 Russ. C. & M. 676. This presumption is not affected by 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 48; R. v. Groombridge, 1836 (Gaselee, J., and Ld. Abinger); and it applies to the offence of carnally abusing a

guilty, under sect. 4 of the Criminal Law Amendment Act, 1885,¹ of the offence of carnal knowledge of a girl under thirteen,² though he may be convicted of a criminal assault upon her,³ or of committing an assault with intent to perpetrate that crime;⁴ a female under thirteen is presumed incapable of consenting to sexual intercourse, and to have carnal knowledge of her is a felony; while an attempt to have such knowledge is a misdemeanour,⁵ and to have, or attempt to have, carnal knowledge of a girl over thirteen and under sixteen is a misdemeanour,⁶ and the consent of a girl under thirteen to an act of indecency cannot be set up as a defence to a charge of assault.⁷ An unmarried girl under eighteen cannot consent to be abducted in order that a man may have carnal knowledge of her, and to abduct such a girl for such a purpose is a misdemeanour.⁸ An infant of either sex under twenty-one is presumed to be so far incapable of managing his own affairs as not to be able, in general,⁹ to alien land, execute a deed,¹⁰ state an account, to make any binding contract,¹¹ unless for necessities.¹² He is also incapable of being subjected to a receiving order made under the Bankruptcy laws;¹³ and since the first of

girl under the statutory age; *R. v. Jordan*, 1838 (Williams, J.). But if the boy have a mischievous discretion, he may be a principal in the second degree; 1 Hale, 630. The patient may be convicted of an unnatural crime, though the agent be under fourteen; *R. v. Allen*, 1826.

¹ 48 & 49 V. c. 69.

² *R. v. Waite*, 1892.

³ *R. v. Williams*, 1893.

⁴ *R. v. Eldershaw*, 1828 (Vaughan, B.); *R. v. Philips*, 1837 (Patteson, J.).

⁵ See "The Criminal Law Amendment Act, 1885" (48 & 49 V. c. 69), § 4; and see, also, *R. v. Beale*, 1866.

⁶ See *Id.* § 5.

⁷ 43 & 44 V. c. 45 ("The Criminal Law Amendment Act, 1880"), § 2; *R. v. Roadley*, 1880. The last-named case is overruled by the above enactment.

⁸ 48 & 49 V. c. 69, § 7.

⁹ See 18 & 19 V. c. 43 ("The Infants' Settlements Act, 1855"), and 23 & 24 V. c. 83 (Ir.), enabling male infants of twenty, and female infants of seventeen, to make, with the approbation of the Chancery Division, binding settlements on marriage.

¹⁰ See *Martin v. Gale*, 1867, holding a deed by an infant charging his reversionary interest to secure money advanced for necessities voidable and not enforceable.

¹¹ 37 & 38 V. c. 62 ("The Infants' Relief Act, 1874"). As to how far an infant can act as a trustee, or exercise a power, see *King v. Bellord*, 1863; also, *In re Armit's Trusts*, 1868, (Ir.); *In re D'Angibau*, 1880, C. A.

¹² 1 Bl. Com. 465, 466; Co. Lit. 78 b. As to what are necessities, see ante, § 42. As to how far infant shareholders are liable to actions for calls, see *Newry & Ennisk. Ry. Co. v. Combe*, 1849; *Leeds & Thirsk Ry. Co. v. Fearnley*, 1849; *Cork & Brandon Ry. Co. v. Cazenove*, 1847; *N. West. Ry. Co. v. McMichael*, 1850; *Birkenhead, Lanc. & Chesh. Junc. Ry. Co. v. Pilcher*, 1850. An infant lessee, though not liable on the contract of tenancy, is answerable for the rent during his occupation of the premises. *Blake v. Concannon*, 1870 (Ir.). But see *Lempriere v. Lango*, 1879 (Jessel, M.R.).

¹³ *Re Jones*, Ex p. *Jones*, 1881, C. A.

January, 1838, such a person cannot make a will, whether it purports to dispose of real or of personal estate.¹

§ 105. No rigid presumption is fixed by law as to the exact period of life at which the possibility of having issue, without miraculous agency,² becomes in women extinct; but in directing the distribution of trust funds, the courts have been in the habit of assuming that, in general, females, after arriving at the age of fifty-three, are past child-bearing.³

§ 106. A conclusive presumption in favour of *legitimacy* exists in certain cases.⁴ Thus, where husband and wife have cohabited together, and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife is shown to have been, at the same time, guilty of infidelity.⁵ Even where the parents are living separate, a strong presumption of legitimacy still arises, which can only be rebutted, either by proving a divorce *a mensâ et thoro*, or, since the 11th of January, 1858, a judicial separation, or by cogent and almost irresistible proof of non-access in a sexual sense;⁶ and, indeed, the fact that a married woman is living in notorious adultery, though amounting to very strong evidence, is not, in itself, sufficient to repel the presumption of the legitimacy of her offspring.⁷ But where alleged parents have been divorced

¹ 7 W. 4 & 1 V. c. 26 ("The Wills Act, 1837"), §§ 7, 34. Before that date, boys of fourteen years, and girls of twelve, might have disposed of personalty by will, if proved to have been of sufficient discretion. 1 Will. on Ex. 14—16.

² See Gen., ch. xvii., vv. 15—19; ch. xviii., vv. 9—15, and ch. xxi., vv. 1—7.

³ *Haynes v. Haynes*, 1866 (Kindersley, V.-C.), and cases cited in the note. See also *Re Widdow's Trusts*, 1871 (Malins, V.-C.), and *Re Millner's Estate*, 1872, in which last case a woman married for twenty-six years, and having never had a child, was presumed to be barren at the age of forty-nine years and nine months. But in *Croxton v. May*, 1876, the Court of Appeal refused to regard a woman whose age was fifty-four and a half years, married three years, and

never having had a child, past child-bearing. *Sed qu.*, and see *Davidson v. Kimpton*, 1881.

⁴ See ante, § 16.

⁵ *Cope v. Cope*, 1833; *Morris v. Davies*, 1866; *Wright v. Holdgate*, 1850; *Legge v. Edmonds*, 1856; *Banbury Peer.*, 1727, H. L., in *Appendix*, n. E. to *Le Marchant's Gardner's Peer.*; *R. v. Luffe*, 1807. As to the Mahomedan Law on this subject, see *Ashrufood Dowlah Ahmed v. Hyder Hossein Khan*, 1885.

⁶ *Id.*; *Bosville v. Attorney-Gen.*, 1887; *Saye and Sele Peer.*, 1846, H. L.; *Hargrave v. Hargrave*, 1848; *Plowes v. Bossey*, 1862; *Atchley v. Sprigg*, 1864.

⁷ *R. v. Mansfield*, 1841. In this case *Jd. Denman* questions the authority of *Cope v. Cope*, 1833. See *Hawes v. Draeger*, 1883 (Kay, J.).

or judicially separated, children born during the separation are *primâ facie* illegitimate.¹

§ 107.² Conclusive presumptions are also known to the *law of nations*. For instance, despatches of the enemy which a neutral vessel is found carrying between different parts of the enemy's dominions, are presumed to be hostile,³ at least, if they have been fraudulently concealed; the *spoliation of papers* by a captured party is regarded, in all the States of Continental Europe, as giving rise to a conclusive presumption of guilt. But, in general, in England and America, the presumption of guilt is only *primâ facie*, and is open to explanation. English and American law are more lenient, and do not found on the mere spoliation of papers an absolute presumption of guilt. But they only stop short of that result; for a case that escapes with such a brand upon it is saved, as it were, from the fire;⁴ and where the case labours under other circumstances of suspicion, or the surrounding circumstances establish bad faith or gross prevarication, the presumption is, even in English and American law, conclusive.⁵ Again, a presumption all but conclusive is raised against any vessel which has been captured while entering a blockaded port; and the owner can protect the ship from being condemned as lawful prize only by establishing a justification on the ground of imperative necessity.⁶ It is, moreover, also *primâ facie* presumed that the owners of a cargo found on board a ship, which is condemned for blockade-running, were privy to the intention of violating a blockade, and their only escape from this presumption is their being able to prove that, at the time when the shipment was made, they could not have known that the blockade had been imposed.⁷

§ 108.⁸ In all cases of conclusive presumption, the rule of law merely attaches itself to the circumstances when proved; it is not deduced from them. It is not a rule of inference from testimony, but a rule of protection, which is held to be expedient for the

¹ *St. George v. St. Margaret*, 1706; *Hetherington v. Hetherington*, 1887. In such cases, non-access is presumed.

² Gr. Ev. § 31, in part.

³ *The Atalanta*, 1808.

⁴ *The Hunter*, 1815 (Sir W. Scott).

⁵ *The Pizarro*, 1817 (Am.); *The Hunter*, 1815. See post, § 116.

⁶ *Baltazzi v. Ryder*, 1858.

⁷ *Id.*

⁸ Gr. Ev. § 32, almost verbatim.

general good. It is not, for example, assumed that all landlords have good titles; but it is held that it will be a public inconvenience to suffer tenants to dispute them. Neither is it assumed that all averments and recitals in deeds and records are true; but it is held that it will be mischievous if parties are permitted to deny them. It is not assumed that all simple contract debts, of six years' standing, are paid, nor that every man quietly occupying land twenty years as his own has a valid title by grant; but it is deemed expedient that claims opposed by such evidence as the lapse of those periods affords, should not be countenanced, and that society is more benefited by a refusal to entertain such claims than by suffering them to be made good by proof. In fine, the law does not assume the impossibility of things which are possible; but the presumption of law is founded, not only on the possibility of their existence, but on their occasional occurrence; and it is against the mischiefs of their occurrence that it interposes its protecting prohibition.¹

§ 109—110.² We now come to the *second* class, into which are divided presumptions of law.³ These are what are termed *disputable presumptions*, and answer to the *præsumptiones juris* of the Roman law. Presumptions of this class may always be overcome by opposing proof.⁴ These disputable presumptions of law are, like *conclusive* presumptions, the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion, or the effect, of the other. Where disputable presumptions arise, however, the connexion is not so intimate, or so uniform, that it can be conclusively presumed to exist in every case; yet it is so general, that the law itself, without the aid of a jury, in the absence of all opposing evidence, infers the one fact from the proved existence of the other. In this mode *the law*—even in the absence of any corresponding allegation in the pleading⁵—defines the nature and amount of the evidence which is sufficient to establish a *primâ facie* case, and to throw the burthen of proof on the other party; and says that in such cases, if no opposing evidence is offered, the jury are bound to find in favour

¹ See 6 Law Mag. 348, 355, 356.

² Gr. Ev. § 33, in great part.

³ See *supra*, § 70.

⁴ Hein. ad Pand. P. iv. § 124.

⁵ R. S. C. 1883, Ord. XIX. r. 25, cited *post*, § 368, n.

of the presumption, and that a contrary verdict may be set aside as being against evidence.

§ 111. Disputable presumptions of law differ from mere presumptions of fact in three important particulars. In the first place, the judge is bound to explain to the jury whatever legal presumptions arise from the facts proved;¹ next, the jury are bound to give full weight to the presumptions so explained; and lastly, the court alone, without the intervention of the jury, may draw the proper legal inferences, whenever the requisite facts are developed in the pleadings.² In practice, however, the distinction between presumptions of law and presumptions of fact is by no means well defined, and the line of demarcation, even when visible at all, is often overlooked.³ A presumption which is regarded by some judges as one of law, is treated by others as one of fact; nay, the same judges place the same presumption at different times in different classes. The following remarks principally apply to disputable presumptions of law, but they will be occasionally found to extend to cogent presumptions of fact.

§ 112. One of the most important of disputable legal presumptions is that of *innocence*. This, in legal phraseology, “gives the benefit of a doubt to the accused,” and is so cogent, that it cannot be repelled by any evidence short of what is sufficient to establish the fact of criminality with moral certainty.⁴ In civil disputes, when no violation of the law is in question, and no legal presumption operates in favour of either party, the preponderance of probability, due regard being had to the burthen of proof, may constitute sufficient ground for a verdict.⁵ To affix on any person the stigma of crime requires, however, a higher degree of assurance; and juries will not be justified in taking such a step, except on evidence which excludes from their minds all reasonable doubt.⁶ It has sometimes been said, that the presumption in question is confined to the criminal courts, and is adopted there specially in favour of life and liberty, and as a safeguard against error in

¹ Ante, § 25.

² Best, Ev. 404, 405.

³ Best, Ev. 424.

⁴ St. Ev. 817, 865, 4th ed.; 1 Gr. Ev. § 13 a; R. v. White, 1865 (Martin, B.).

⁵ St. Ev. 818, 4th ed.; 1 Gr. Ev. § 13 a; Best, Ev. 120; Cooper v. Slade, 1858, H. L. (Willes, J.).

⁶ St. Ev. 817, 865, 4th ed.; Best, Ev. 120.

convictions which are not open to revision.¹ But it rests on a broader basis. The right which every man has to his character, the value of that character to himself and his family, and the evil consequences that would result to society if charges of guilt were lightly entertained, or readily established in courts of justice:—these are the real considerations which have led to the adoption of the rule that all imputations of crime must be strictly proved. The rule, accordingly, is recognised alike by all tribunals, whether civil or criminal, and in all proceedings, whether the question of guilt be directly or incidentally raised.² For example, in an action against an insurance company to recover a loss by fire, and where the defence is that the plaintiff wilfully burnt down the premises, the jury, before finding a verdict against the plaintiff, must be satisfied that the act imputed to him has been proved by clear evidence, so clear as to justify a conviction for arson;³ and, in general, whether the question arises in a prosecution for it, or in a civil court, forgery or bigamy must similarly be established by the same strict evidence.⁴

§ 113.⁵ So strong is the presumption of *innocence*, that even where guilt can be established only by proving a negative, that negative must, in most cases (unless indeed a special statute be applicable⁶), be proved, though as a general rule the burthen of proof lies on the party alleging the affirmative. For instance, a plaintiff who complained that the charterer of a ship had put on board an article highly inflammable and dangerous, *without giving notice* of its nature to the master in charge, was held bound to prove this negative averment.⁷

§ 114.⁸ Questions of nicety arise where the presumption of

¹ *Magee v. Mark*, 1860 (Ir.) (Pigot, C.B.); Best, Ev. 120; 1 Gr. Ev. § 13 a.

² Best, Ev. 447.

³ *Thurtell v. Beaumont*, 1823.

⁴ *Chalmers v. Shackell*, 1834 (Tindal, C.J.); *Willmet v. Harmer*, 1839 (Ld. Denman). See, also, *Neeley v. Lock*, 1838 (Tindal, C.J.); *Magee v. Mark*, 1860 (Ir.) (Fitzgerald, P.).

⁵ Gr. Ev. § 35, in part.

⁶ See post, § 372.

⁷ *Williams v. E. Ind. Co.*, 1802. So of allegations that a party had not taken the Sacrament: *R. v. Hawkins*, 1808; or had not complied with the Act of Uniformity, &c.: *Powell v. Milburn*, 1772; or that goods were not legally imported: *Sissons v. Dixon*, 1826; or that a theatre was not duly licensed: *Rodwell v. Redge*, 1824. See post, § 371.

⁸ Gr. Ev. § 35, in part.

innocence is met by some counter presumption.¹ For example, where a woman, twelve months after her husband (a soldier on foreign service) was last heard of, married a second husband, on a question as to the settlement of the children by the second husband, it was held that it might be presumed that the first husband was dead at the time of the second marriage, though the presumption of the continuance of life would have prevailed had it not been displaced by the stronger legal presumption of innocence;² and on a trial for bigamy of a woman who had married again only four years after separating from her first husband, it was held that the law could not presume the continuance of the first husband's life, but that it was a question of fact for the jury whether he was alive or dead at the date of the second marriage;³ but where a letter was proved to have been written by a wife from Van Dieman's Land, dated only twenty-five days prior to second marriage, it was held that it might be presumed that the husband had been guilty of bigamy;⁴ and on an indictment for manslaughter by driving a cab over a woman, the fact that the woman had been killed was in itself regarded as sufficient *prima facie* evidence of negligence to rebut the presumption of innocence, and to place upon the driver the burthen of proving that he had exercised due care.⁵

§ 115. An exception to the rule that innocence is to be presumed on principles of public policy exists in some cases of agency, both in criminal and civil cases.⁶ Thus, a contract baker may be convicted of selling unwholesome bread, if it appear that he has allowed his foreman to use alum, though not in such quantities as to render the bread unwholesome, but that the servant has introduced alum to a deleterious extent;⁷ by the Pawnbrokers Act, 1872, "anything done or omitted by the servant, apprentice,

¹ See *Middleton v. Barned*, 1849; *R. v. Bjornsen*, 1865.

² *R. v. Twynning*, 1819. See *R. v. Jones*, 1883.

³ *R. v. Lumley*, 1869; *R. v. Willshire*, 1881. See further, *R. v. Jones*, 1868; and see, as to the presumption of life, §§ 198—203, post.

⁴ *R. v. Harborne*, 1835; *R. v. Mansfield*, 1841. See, also, *Lapsley*

v. Grierson, 1848, H. L.; and the *Breadalbane* case, 1866, H. L., cited post, § 172.

⁵ *R. v. Cavendish*, 1873 (Ir.).

⁶ See post, §§ 905, 906. See, also, *Cooper v. Slade*, 1857, H. L. (Ld. *Wensleydale*).

⁷ *R. v. Dixon*, 1814. See *Att.-Gen. v. Riddle*, 1832; and *Searle v. Reynolds*, 1866.

or agent of a pawnbroker, in the course of or in relation to the business," shall be deemed to be done or omitted by the pawnbroker;¹ the directors of a gas company are criminally answerable for an act done by their superintendent and engineer, under a general authority to manage the works, though personally ignorant of the particular plan adopted, and though such plan was a departure from the original and understood method, which the directors had no reason to suppose was discontinued;² and the sale of a libel³ in a bookseller's shop by his servant in the ordinary course of his employment, is evidence of a guilty publication by the master. But this presumption is never *conclusive* against the master. Indeed, on indictments for libel, it is especially provided that the master, under "not guilty," may prove that the publication was in fact made "without his authority, consent, or knowledge," and that there was "no want of care or caution on his part."⁴ Similar principles apply not only to publishers of newspapers,⁵ but to owners of alkali works.⁶

§ 115A. In spite of the usual presumption of innocence, it must, too, be presumed on a prosecution under the Prevention of Cruelty to Children Act, 1894, that the child, who is the subject of the charge, is of the age which it is charged as being and apparently is.⁷

§ 116.⁸ Moreover, the presumption of innocence may be overthrown, and a *presumption of guilt* be raised, by the misconduct of the party in suppressing or *destroying evidence*, which he ought to produce, or to which the other party is entitled.⁹ For example,

¹ 35 & 36 V. c. 93, § 8.

² *R. v. Medley*, 1834 (Ld. Denman). See, also, *R. v. Stephens*, 1866; *Mullins v. Collins*, 1874; and *Betts v. De Vitre*, 1868 (Ld. Chelmsford, C.); and *Dickinson v. Fletcher*, 1874; *Somerset v. Hart*, 1884; distinguished *Bond v. Evans*, 1888.

³ Gr. Ev. § 36, in part.

⁴ 6 & 7 V. c. 96 ("The Libel Act, 1843"), § 7. As to the law before the stat., see 1 Russ. C. & M. 251; *R. v. Gutch*, 1829; *Harding v. Greening*, 1817; *R. v. Almon*, 1770.

⁵ 1 Russ. C. & M. 251; 6 & 7 V. c. 96 ("The Libel Act, 1843"), § 7;

R. v. Holbrook, 1878; on second trial, 1878; *R. v. Ramsey*, 1884.

⁶ 44 & 45 V. c. 37 ("The Alkali, &c. Works Regulation Act, 1881"), § 25, amended by 55 & 56 V. c. 30.

⁷ 57 & 58 V. c. 41, § 17.

⁸ Gr. Ev. § 37, in great part.

⁹ For instance, formerly, by 21 J. 1, c. 27 (probably copied from a similar edict of Hen. II. of France, cited by Domat), the mother of an illegitimate child who endeavoured privately, either by drowning, or secret burying, or by any other way, to conceal its death, was presumed to have murdered it, unless she could

the spoliation of papers, material to show the neutral character of a vessel, furnishes, as before pointed out¹), a strong presumption, *in odium spoliatoris*, against the ship's neutrality;² if any person on board a vessel, which is being chased by an officer of the preventive service, throw overboard, stave, or destroy any part of the lading, the vessel is forfeited, because such conduct raises an almost irresistible presumption that the freight so made away with was legally liable to seizure;³ the concealment on board a vessel of any goods liable to duty, justifies the inference that the owner intended to defraud the customs, and such goods will accordingly be forfeited;⁴ a presumption that they are adverse to him is raised against a party, who, having obtained possession of papers from a witness, after the service of a subpoena duces tecum upon the latter, withholds them at the trial.⁵ Indeed, the general rule is "*omnia præsumentur contra spoliatorem*,"⁶ whose conduct is attributed to a supposed consciousness that the truth would operate against him. Thus, to take a familiar example, where the finder of a jewel would not produce it, the jury, under the judge's direction, presumed against him that it was of the highest value of its kind.⁷ But in an action for goods sold against a defendant who has been guilty of no fraud or improper conduct, in the absence of evidence of the quality of the goods which were delivered, the presumption is that such goods were goods of the cheapest description.⁸

§ 117.⁹ But the mere *fabrication* of evidence does not of itself furnish any presumption *of law* against the innocence of the party, but is a matter to be dealt with by the jury. Innocent persons, under the influence of terror, have sometimes been led to the simulation of exculpatory facts, of which there are several instances in the

prove by one witness at the least that the child was born dead. This barbarous rule is now rescinded both in England and America. See, as to present English law, 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 60.

¹ Supra, § 107.

² The Hunter, 1815; The Pizarro, 1827 (Am.).

³ See 39 & 40 V. c. 36 ("The Customs Consolidation Act, 1876"), § 180.

⁴ See 39 & 40 V. c. 36, § 177.

⁵ Leeds v. Cook, 1803.

⁶ 2 Poth. Obl. 292; Dalston v. Coatsworth, 1721; Cowper v. Ld. Cowper, 1734; R. v. Arundel, 1721; D. of Newcastle v. Kinderley, 1803; Gray v. Haig, 1855; Annesley v. E. of Anglesea, 1743 (Ir.). See, also, Sir S. Romilly's argument in Ld. Melville's case, 1806; Anon., 1698. In Baker v. Ray, 1826, the L. C. thought that this rule had in some cases been pressed a little too far.

⁷ Armory v. Delamirie, 1721.

⁸ Clunnes v. Pezzey, 1807.

⁹ Gr. Ev. § 37, as to first six lines.

C. V.] FABRICATION AND NON-PRODUCTION OF EVIDENCE.

books.¹ Moreover, the exercise by a client of his undoubted right to prevent his solicitor from disclosing confidential communications, forms no just ground for adverse presumption against him.² The non-production of deeds or papers, after notice, has, in general, only the effect of admitting the other party to prove their contents by parol,³ and, as against the party refusing to produce them, to raise a *prima facie* presumption that they have been properly stamped.⁴ Nevertheless, such conduct is, in the absence of excuse, calculated to produce a very prejudicial effect in the minds of the jury against the person having recourse to it;⁵ and if the production of his papers would establish the guilt or innocence of a person charged with fraud or misconduct, the jury will be amply justified in presuming him guilty from the unexplained fact of their non-production.⁶ Indeed, jurors will always do well to regard with suspicion the conduct of a party, who, having it in his power to produce cogent evidence in support of his case, offers testimony of a weaker and less satisfactory character.⁷

§ 118.⁸ Though the general presumption of law is in favour of innocence, yet, as men seldom do unlawful acts with innocent intentions, the law presumes that every act, which in itself is unlawful, has been wrongfully intended, till the contrary appears.⁹ Thus, on a charge of murder, malice is presumed from the fact of killing, unaccompanied by circumstances of extenuation; and the burthen of disproving the malice is thrown upon the accused;¹⁰ and if an unauthorised party, to raise money, puts the name of another person to a bill, a felonious intent will be presumed, unless the accused show reasonable grounds for believing that he was autho-

¹ See 3 Inst. 232; Wils. Circ. Ev. 154.

² *Wentworth v. Lloyd*, 1864, H. L. (Ld. Chelmsford).

³ *Cooper v. Gibbons*, 1813.

⁴ *Crisp v. Anderson*, 1815. See § 148, post.

⁵ See *Roe v. Harvey*, 1769 (Ld. Mansfield); *Bate v. Kinsey*, 1835 (Ld. Lyndhurst); *Sutton v. Devonport*, 1858; *Edmonds v. Foster*, 1876.

⁶ *Clifton v. U. S.*, 1846 (Am.).

⁷ See N. Y. Civ. Code, § 1852, arts. 6 and 7.

⁸ Gr. Ev. § 34, as to first seven lines.

⁹ "Where an act, in itself *indifferent*, if done with a particular intent becomes criminal, there the intent must be proved and found; but where the act is in itself *unlawful*, the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent." *R. v. Woodfall*, 1770 (Ld. Mansfield). See also *R. v. Harvey*, 1827; *R. v. Wallace*, 1853 (Ir.); and *R. v. Creevey*, 1813.

¹⁰ *Fost. C. L.* 255.

rised to act as he did, and acted on that belief.¹ A similar presumption arises in civil actions, where the act complained of is unlawful. Thus, on the one hand, where the act was *primâ facie unlawful*, malice in law is presumed. For instance, in actions of slander, though it appear that the defendant was not actuated by ill-will against the plaintiff, malice *in law* will usually be inferred from the fact of intentional publication.² And in other actions for damages founded on wrongs, as for a malicious arrest, a malicious prosecution, and the like, the fact that the defendant has had recourse to legal proceedings raises a *primâ facie* inference in his favour, which the plaintiff is bound to rebut by proving the absence of all reasonable and probable cause,³ and the presence of an actual malicious intent.⁴ On the other hand, where the act was *primâ facie lawful*, and an action cannot be maintained in respect of it except on proof of "malice," malice in law will not be implied, but it is necessary that *actual* malice be proved. If, therefore,

¹ *R. v. Beard*, 1837 (Coleridge, J.).

² *Bromage v. Prosser*, 1825, where Bayley, J., as to *implied* (or legal) malice (as distinguished from malice in fact), says: "Malice, in the common acceptance, means ill-will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle, without knowing whose they are; if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. * * * If I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I mean to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognises the distinction between these two descriptions of malice, malice in fact, and malice in law, in

actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them falsely; it is not necessary to state that they were spoken maliciously. This is so laid down in *Sty.* 392, and was adjudged upon error in *Mercer v. Sparkes*, 1536. The objection there was, that the words were not charged to have been spoken maliciously, but the court answered, that the words were themselves malicious and slanderous, and, therefore, the judgment was affirmed. But in actions for such slander as is *primâ facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff, and in *Edmonson v. Stevenson*, 1765, *Ld. Mansfield* takes the distinction between these and ordinary actions of slander."

³ *Abrath v. North East Ry. Co.*, 1886, *H. L.* See, also, *Davidson v. Smyth*, 1887 (*Ir.*).

⁴ *Mitchell v. Jenkins*, 1833; *Porter v. Weston*, 1839; *Johnstone v. Sutton*, 1786. The jury *may*, but are not *bound*, to infer malice in fact from the want of probable cause. *Id.*

defamatory language was used upon a privileged occasion, the plaintiff must establish *actual* malice,¹ and in order to do this, must, either by extrinsic or by intrinsic evidence,² prove facts which are *inconsistent* with bona fides.³ The occasion being lawful, the *prima facie* legal presumption, which exists till it is displaced by actual evidence, is that the speaker was actuated by proper motives.⁴

§ 119. Some presumptions also exist with respect to the *ownership* of property. Thus, with regard to *boundaries* of property,⁵ where two counties or parishes are separated by a non-tidal⁶ river, the mid-stream is the presumptive boundary between them;⁷ the owner of a several fishery is, when the terms of the grant are unknown, presumed to be the owner of the soil;⁸ the soil of unnavigable rivers, *usque ad medium filum aquæ*, together with the right of fishing,—but not the right of abridging the width, or interfering with the course, of the stream,⁹—is presumed to belong to the owner of the adjacent land;¹⁰ and, in navigable rivers and arms of the sea, the soil is *prima facie* vested in the Crown, and the fishery is *prima facie* public.¹¹ These presumptions as to riparian ownership in streams, do not, however, apply to great non-tidal inland lakes, whether navigable or not.¹² But somewhat similar presumptions are recognised in respect of the sea-shore. Land there which

¹ Clark v. Molyneux, 1877, C. A.

² Cooke v. Wildes, 1856.

³ Toogood v. Spyring, 1834; Whitfield v. South East Ry. Co., 1858; Coxhead v. Richards, 1846; Spill v. Maule, 1869; Wright v. Woodgate, 1835; Taylor v. Hawkins, 1851; Gilpin v. Fowler, 1854; Somerville v. Hawkins, 1851; Harris v. Thompson, 1853; R. v. Wallace, 1853 (Ir.). In an action for alleged libel contained in an answer to inquiries respecting a servant's character, the jury may find express malice from the simple fact that the answer complained of was untrue to defendant's knowledge. Fountain v. Boodle, 1842.

⁴ Note b to Hodgson v. Scarlett, 1818; approved of by Alderson, B., in Gibbs v. Pike, 1842.

⁵ As to boundaries of counties, &c., in Ireland, see 35 & 36 V. c. 48 ("The County Boundaries (Ireland) Act,

1872"), §§ 2, 3, 4, cited post, § 1771.

⁶ Bridgwater Trust v. Bootle-cum-Linacre, 1866.

⁷ R. v. Landulph, 1834 (Patteson, J.); M'Cannon v. Sinclair, 1859; R. v. Strand Board of Works, 1864.

⁸ D. of Somerset v. Fogwell, 1826; Holford v. Bailey, 1850 (in error); Marshall v. The Ulleswater St. Navig. Co., 1863. But see observations, *contra*, by Cockburn, C.J., in S. C., at pp. 747—749; also, Bloomfield v. Wharton, 1867 (Ir.).

⁹ Bickett v. Morris, 1866, H. L.

¹⁰ Carter v. Murcot, 1768; Wishart v. Wyllie, 1853; Lord v. Commiss. for City of Sydney, 1859; Crossley v. Lightowler, 1867; Dwyer v. Rich, 1871 (Ir.).

¹¹ Carter v. Murcot, 1768; Malcomson v. O'Dea, 1862, H. L.

¹² Bloomfield v. Wharton, 1867 (Ir.); Bristow v. Cormican, 1878, H. L.

is covered by the ordinary high water,—or, to speak more accurately, by the medium high tide between the spring and the neap,¹—is presumed *primâ facie* to be the property of the Crown, though by grant or prescription it may belong to the lord of the manor, or to any other subject;² while that which is overflowed only at spring tide, is presumed to be vested in the proprietor of the adjoining lands;³ land between high and low water mark, though forming part of the body of the adjoining county,⁴ is *primâ facie* presumed to be extra-parochial.⁵ Similarly, waste land on the sides, and the soil to the middle, of a highway, are, in the absence of evidence to the contrary, presumed to belong to the owner of the adjoining inclosed land, whether he be a freeholder, leaseholder, or copyholder.⁶ This latter presumption is founded on a supposition that the proprietor of the adjoining land, at some former period, gave up to the public for passage all the land between his inclosure and the middle of the road,⁷ and is, consequently, liable to be rebutted by showing that the road has never in fact been dedicated to the public at all,⁸ or that it was originally dedicated by some other party,⁹ or that the lord of the manor, or even that a stranger, has exercised acts of ownership, either over the spot in dispute, or over other waste land in immediate connection with it.¹⁰ The presumption just mentioned as usually prevailing in the case of a public highway, also obtains in the case of a private occupation road running between two properties. In the absence of all evidence of acts of ownership, in such a case each owner will be presumed to be the proprietor of the soil *usque ad medium filum viæ*.¹¹ And

¹ *Att.-Gen. v. Chambers*, 1854.

² *Blundell v. Catterall*, 1821 (*Holroyd, J., Bayley, J.*); *Lopez v. Andrew*, 1826; *Calmady v. Rowe*, 1848. See post, §§ 130, 131.

³ *Lowe v. Govett*, 1832.

⁴ *Embleton v. Brown*, 1860.

⁵ *R. v. Musson*, 1858; *Waterloo Bridge Co. v. Cull*, 1859 (*Ld. Campbell*). This presumption applies not only to the main seashore, but also to an estuary or arm of the sea: *Ipswich Dock Commrs. v. St. Peter*, *Ipswich*, 1867; and to the shore of a tidal river: *Bridgwater Trust v. Bootle-cum-Linacre*, 1867.

⁶ *Doe v. Pearsey*, 1827; *Steel v.*

Prickett, 1819 (*Abbott, C.J.*); *Cooke v. Green*, 1823; *Scoones v. Morrell*, 1829; *M. of Salisbury v. Gt. N. Ry. Co.*, 1858; *Simpson v. Dendy*, 1860; *Berridge v. Ward*, 1861; *R. v. Strand Board of Works*, 1864. See *Gery v. Redman*, 1875.

⁷ *Doe v. Pearsey*, 1827 (*Bayley, J.*).

⁸ *Leigh v. Jack*, 1879, *C. A.*

⁹ *Headlam v. Headley*, 1810 (*Bayley, J.*).

¹⁰ *Doe v. Kemp*, 1835; *Gróse v. West*, 1816; *Anon.*, 1773; *Doe v. Kemp*, 1831; *Doe v. Hampson*, 1847; *Beckett v. Corporation of Leeds*, 1871 (*L.J.J.*).

¹¹ *Holmes v. Bellingham*, 1859.

the mere fact that the owner of a field has a private right of way over a lane leading only to that field, affords no presumption that the soil of the lane is vested in him.¹ Indeed, as to roads set out under the first general Inclosure Act, the presumption that "the herbage and grass arising therefrom" belongs to the proprietors of the adjoining lands is conclusive.² As to roads made under the later Act of William the Fourth, the commissioners are directed to award "the grass and herbage growing and renewing upon" them to such persons as in their judgment are best entitled to the same.³ But as both Acts are silent respecting the ownership of the *soil*, it seems that no legal presumption as to *that* can, under either Act, arise in favour of the proprietors of the neighbouring allotments.⁴

§ 120. Further presumptions of law with regard to boundaries are as follows. Where fields belonging to different owners are separated by a hedge and ditch, the hedge *primâ facie* belongs to the owner of the field in which the ditch is not.⁵ The common user of a wall separating lands or houses which belong to different proprietors, is *primâ facie* evidence that the wall, and the land on which it stands, belong to them in equal moieties as tenants in common.⁶ But this presumption may be rebutted by showing that the wall in fact stands on land, parts of which were separately contributed by each proprietor.⁷ There is⁸ a distinction between a bank and a wall; the former, being made of *earth* taken from the adjacent soil, is presumed to belong to the party whose land adjoins thereto; the latter, being built of materials brought from a distance, is *primâ facie* the property of the person who is bound to repair it. Where a tree grows on the boundary of two fields, so that the roots extend into the soil of each, the property in the

¹ *Smith v. Howden*, 1863.

² 41 G. 3, c. 109, § 11 ("The Inclosure (Consolidation) Act, 1801").

³ 6 & 7 W. 4, c. 115, § 29.

⁴ *R. v. Hatfield*, 1835 (Ld. Denman); *R. v. Edmonton*, 1831 (Ld. Tenterden).

⁵ *Guy v. West*, 1808 (Bayley, J.). Where there are two ditches, one on each side of the hedge, no presumption arises, and the ownership of the hedge depends upon evidence: see *id.* In France, boundary hedges

and the trees in them are declared to be common property, "*mitoyens*," except in certain cases; Code Civ., Arts. 670, 673.

⁶ *Cubitt v. Porter*, 1828; *Wiltshire v. Sidford*, 1827; *Watson v. Gray*, 1880 (Fry, J.).

⁷ *Matts v. Hawkins*, 1813; *Murly v. McDermott*, 1838.

⁸ *D. of Newcastle v. Clark*, 1818 (Park, J.); *Callis on Sewers*, p. 74, 4th ed.

tree is presumed to belong to the owner of that land in which it was first sown or planted.¹

§ 121. The following *disputable* presumptions arise when the surface and the property lying beneath it are vested in different owners. In the case of land, if the surface and the subjacent minerals are vested in different owners without any deeds² regulating their respective rights, the law presumes that the owner of the surface has a right to the *support* of the minerals.³ Similarly, when a building is divided into different flats, the proprietor of every upper story has a presumptive legal right, without any express grant, or enjoyment for any given time, to the support of each lower story, and the owner of each lower story is entitled to the protection afforded by the upper rooms as a roof or covering for his dwelling.⁴ When two adjoining closes, or two ancient buildings,⁵ respectively belong to different persons, the owner of the one is presumed to have a limited right⁶ to the *lateral support* of the other.⁷ This presumption of a right to support does not extend to a case where, by the erection of modern buildings, an additional weight has been put upon the land.⁸ Yet even here, if the house has been built for more than twenty years, the law will presume the grant of an easement entitling the grantor to have his house supported by the soil of his neighbour's property⁹ if the

¹ *Holder v. Coates*, 1827 (Little-dale, J.); *Masters v. Pollie*, 1620; *contra*, *Waterman v. Soper*, 1697—1698; *Anon.*, 1623.

² Where such deeds exist, see *Aspden v. Seddon*, 1875; *Davis v. Treharne*, 1881, *per Dom. Proc.*

³ *Humphries v. Brogden*, 1848; *Smart v. Morton*, 1855; *Harris v. Ryding*, 1839; *Haines v. Roberts*, 1857; *Rowbotham v. Wilson*, 1861 (H. L.); *Caledonian Ry. Co. v. Sprot*, 1856 (H. L.). See *Elliot v. The N. East. Ry. Co.*, 1863 (H. L.); *Brown v. Robins*, 1859; *Fletcher v. Gt. W. Ry. Co.*, 1859; *Gt. W. Ry. Co. v. Bennett*, 1867; *Pountney v. Clayton*, 1883 (C. A.); *Jeffries v. Williams*, 1850; *Rogers v. Taylor*, 1858; *Eadon v. Jeffcock*, 1872; *Hext v. Gill*, 1872; *Dugdale v. Robertson*, 1857. The right of support is an ordinary right of pro-

perty incidental to all land, and not a right founded on any presumption of a grant or an easement: *Backhouse v. Bonomi*, 1861 (H. L.). Also, *Wakefield v. D. of Buccleuch*, 1866; also, *May of Birmingham v. Allen*, 1877 (C. A.); *Dixon v. White*, 1883 (H. L.). And every fresh subsidence of a worked-out mine gives a new cause of action: *Mitchell v. Darley Main Coal Co.*, 1886 (H. L.).

⁴ *Humphries v. Brogden*, 1848; *Caledonian Ry. Co. v. Sprot*, 1856 (H. L.).

⁵ *Lemaitre v. Davis*, 1881 (Hall, V.-C.).

⁶ See *Smith v. Thackeray*, 1866; and *Siddons v. Short*, 1877.

⁷ 2 Roll. Abr. 564, *Trespas I.*, pl. 1, cited in 12 Q. B. 743.

⁸ *Murchie v. Black*, 1865.

⁹ *Wyatt v. Harrison*, 1832; *Hide v. Thornborough*, 1846; *Partridge v.*

easement has been enjoyed peaceably, openly, and without any attempt at deception or concealment.¹ Where, too, a landowner, having built two or more adjoining houses in such a way as to require mutual support, or mutual drainage, afterwards parts with them to different persons, either a grant or reservation will, in general,² be presumed, entitling each owner to have his house supported by,³ or drained through,⁴ the adjoining buildings. A presumption, however, of a legal right for bowsprits to project will not be made where a dock and a wharf belonging to the same owner, a separate sale is made of the wharf after the bowsprits of vessels in the dock had for some years usually projected over a part of the wharf.⁵

§ 122. With regard to *manors*, the following disputable presumptions exist. The lord of the manor is *primâ facie* entitled to all *waste* lands within the manor; and it is not essentially necessary that he should show acts of ownership upon them.⁶ The lord, in exercising his right as owner of the soil to take gravel, marl, loam, or subsoil, so long as he can do it without injury to the commoners, will be presumed not to have exceeded his limited powers, and if they complain the tenants must adduce some evidence that he has done so.⁷ In the case of an “*improvement*” by him, however, the presumption is against the lord, apparently on the ground that, as he has made a grant over the whole waste, his right to inclose any portion of it must be conditional on his establishing that sufficient waste is left for the tenants to enjoy their rights of common.⁸

§ 122A. When a tenant encroaches upon and incloses the waste contiguous to his farm, he is presumed, in the absence of facts proving a contrary intention, to have done it for the benefit of his

Scott, 1838, all of which cases are commented on in *Humphries v. Brogden*, 1848. See *Hunt v. Peake*, 1860 (Am.); *Jeffries v. Williams*, 1850; *Rogers v. Taylor*, 1858.

¹ *Dalton v. Angus*, 1881 (H. L.). See, also, *Bell v. Love*, 1884 (H. L.).

² See *Murchie v. Black*, 1865.

³ *Richards v. Rose*, 1852. See *Solomon v. Vintners' Co.*, 1859, and *Kempston v. Butler*, 1861 (Ir.).

⁴ *Pyer v. Carter*, 1856; *Hall v. Lund*, 1863. The authority of *Pyer*

v. Carter has been denied by *Ld. Westbury, C.*, in *Suffield v. Brown*, 1864. See *Pearson v. Spencer*, 1863; *Wheeldon v. Burrows*, 1878, C. A.; *Polden v. Bastard*, 1865; *Watts v. Kelson*, 1870.

⁵ *Suffield v. Brown*, 1864.

⁶ *Doe v. Williams*, 1836 (*Cole-ridge, J.*).

⁷ *Hall v. Byron*, 1876.

⁸ *Id.*; *Arlett v. Ellis*, 1827 (*Bayley, J.*); *Lascelles v. Ld. Onslow*, 1877 (*Lush, J.*).

landlord.¹ This presumption will be recognised even though the lands inclosed be the property of a stranger;² and will be much strengthened, if the landlord of the farm be also the lord of the waste.³

§ 123. A presumption of *ownership* in many cases arises from *possession*, as men generally own the property they possess.⁴ This presumption arises under the Factors Act;⁵ under the Irish, Scotch, and English Acts relating to injuries done by dogs to sheep;⁶ under the Pawnbrokers Act, 1872, so far as relates to the holders of pawn-tickets;⁷ and also under most of the statutes authorising the compulsory sale of lands for particular purposes; as, for instance, in the Lands Clauses Consolidation Act.⁸ It may also be illustrated by a great variety of cases at common law. Thus in an action on a policy of insurance on ship and cargo, plaintiff may rely on the mere fact of possession,⁹ or of having purchased the ship's stores,¹⁰ without the aid of any documentary proof or title deeds, unless such further proof be rendered necessary by some contrary evidence. In matters relating either to real or personal property, possession again gives rise to the same presumption of ownership, which in the case of real property is presumed to be ownership in fee.¹¹ Indeed, in actions for *trespass* to real property, the presumption arising from the possession, as against a mere wrongdoer, amounts to *conclusive* evidence.¹² Therefore, in an action for an injury done to the reversion of real estate, proof of

¹ Doe v. Jones, 1846; Andrewes v. Hailes, 1853; Kingsmill v. Millard, 1855; *Ld. Lisburne v. Davies*, 1866; Doe v. Massey, 1851; Doe v. Williams, 1836; Doe v. Murrell, 1837 (*Ld. Abinger*); Doe v. Rees, 1834 (*Parke, B.*); Doe v. Tidbury, 1854; Whitmore v. Humphries, 1871; *Att.-Gen. v. Tomline*, 1877. Formerly this point was otherwise: see Doe v. Mulliner, 1795 (*Ld. Kenyon*); Doe v. Davies, 1795.

² Cases cited in last note.

³ Bryan v. Winwood, 1808.

⁴ Webb v. Fox, 1797 (*Ld. Kenyon*).

⁵ 52 & 53 V. c. 45. See Heyman v. Flewker, 1863; Baines v. Swainson, 1863; Fuentes v. Montis, 1868 (*Ex. Ch.*); Vickers v. Hertz, 1871; Johnson v. Crédit Lyonnais Co., 1877, C. A.

⁶ 25 & 26 V. c. 59 ("The Dogs (Ireland) Act, 1862"), § 2. See, also, 28 & 29 V. c. 50, § 7, *Ir.*; 26 & 27 V. c. 100 ("The Dogs (Scotland) Act, 1863"), § 2, *Sc.*; and 28 & 29 V. c. 60 ("The Dogs Act, 1865"), § 2.

⁷ 35 & 36 V. c. 93, s. 25.

⁸ 8 & 9 V. c. 18, § 79.

⁹ Robertson v. French, 1803; Sutton v. Buck, 1810.

¹⁰ Thomas v. Foyle, 1803 (*Ld. Ellenborough*).

¹¹ Doe v. Coulthred, 1837 (*Ld. Denman*); Jayne v. Price, 1814; Doe v. Penfold, 1838 (*Patteson, J.*). See Metters v. Brown, 1863, as to how this presumption can be rebutted.

¹² Elliott v. Kemp, 1840 (*Parke, B.*).

the receipt of rent¹ by the plaintiff will, unless the sum annually received be so small as to raise a presumption that it is a mere quit rent,² be sufficient evidence of title to the reversion as against all the world, except the real owner and persons claiming under him.³ In actions against wrong-doers for injuries to *personal* chattels, proof of possession, when coupled with evidence that the plaintiff has some special property in such chattels, has, too, long been held to constitute a complete title.⁴ Therefore, an undischarged bankrupt may⁵ sue in trover a wrong-doer who has taken goods out of his custody; certainly possession of a ship under a transfer from the rightful owner, void under the register Acts for non-compliance therewith, constitutes a sufficient title to support an action of trover against a stranger for converting a part of the ship which was wrecked;⁶ even a general bailment will suffice, without being made for any special purpose, but only for the benefit of the rightful owner;⁷ and a mere naked possession will (when no more is proved) entitle a party to maintain trover as against a wrong-doer,⁸ though it will not entitle a mere bailee, who is proved to be under no liability to his bailor, to maintain an action for negligence against a third party.⁹

§ 124. Many authorities also show that the fact of his producing a document makes it ample *prima facie* evidence for a jury in support of a plaintiff's claim.¹⁰ Thus the production of an I O U signed by the defendant, though not addressed to anyone by name, is, in general,¹¹ abundant evidence, not indeed of money lent (of which it furnishes no proof whatever),¹² but of an account stated

¹ See, also, 23 & 24 V. c. 154, § 24, Ir., which makes the receipt of rent, under certain circumstances, for a certain period, *prima facie* evidence of a landlord's derivative title.

² *Doe v. Johnson*, 1819 (Holroyd, J., recognised in *Reynolds v. Reynolds*, 1848) (Ir.).

³ *Daintry v. Brocklehurst*, 1848.

⁴ *Elliott v. Kemp*, 1840 (Parke, B.).

⁵ *Webb v. Fox*, 1797; *Drayton v. Dale*, 1823; *Fyson v. Chambers*, 1842; these were decisions under the old law.

⁶ *Sutton v. Buck*, 1810.

⁷ *Per Chambre, J.*, *id.* 309.

⁸ *Jeffries v. Gt. West. Rail. Co.*,

1856, which resolves a doubt raised by Parke, B., in *Fyson v. Chambers*, 1842; *Fitzpatrick v. Dunphy*, 1851 (Ir.). See also *Armory v. Delamirie*, 1721, 1722; *Sutton v. Buck*, 1810 (Lawrence, J.).

⁹ *Clarridge v. South Staffordshire Rail. Co.*, 1892.

¹⁰ *Fesenmayer v. Adcock*, 1847 (Pollock, C. B.).

¹¹ But it will not furnish evidence of an account stated, if the defendant can show that, in fact, it was not given in acknowledgment of a debt due: *Lemere v. Elliott*, 1861.

¹² *Fesenmayer v. Adcock*, 1847, questioning *Douglas v. Holme*, 1840.

between the parties,¹ and if a letter be given in evidence with the direction torn off, the jury will do well to presume, *primâ facie*, that it was addressed to the party who produces it.²

§ 125. As possession is *primâ facie* proof of ownership in actions for the recovery of land, it is on the one hand an inflexible rule that the plaintiff must solely rely on the strength of his own legal title, and on the other hand clear that proof of a prior possession by the plaintiff, however short, will be *primâ facie* evidence of title as against a wrong-doer.³ Thus, where the plaintiff had given possession of a room to a third party, he was held entitled to recover against the defendant who had, about a year afterwards, broken into the room at night and taken the key;⁴ and again, where on the plaintiff's part, possession for twenty-three years, and making increases of rent during that period, were proved, it was held that defendant could not rebut the presumption of a seisin in fee arising from these unequivocal acts of ownership by merely showing a subsequent possession (for less than twenty years⁵) by himself. The presumption of ownership which arises from possession will in general extend not only to the surface of the land which has been the subject of possession, but to all minerals which are under it.⁶ Still, this presumption is not universal, since in mining districts the right to the minerals and the fee-simple of the soil are frequently in different persons. Even where it arises it may be rebutted by showing either an absence of enjoyment of the minerals by the owner of the soil, or an actual user of the minerals by a stranger.⁷ A very similar *primâ facie* presumption is that the tenant of the surface is tenant of the subjacent strata. But this presumption also is liable to be defeated by proof that the surface and the subsoil have become separate tenements.⁸

¹ See last note; *Curtis v. Rickards*, 1840; *Croker v. Walsh*, 1852 (Ir.). See *Wilson v. Wilson*, 1854.

² *Curtis v. Rickards*, 1840 (Tindal, C.J.).

³ *Asher v. Whitelock*, 1865.

⁴ *Doe v. Dyeball*, 1829. See *Doe v. Barnard*, 1849.

⁵ *Doe v. Cooke*, 1831 (Ld. Tenterden). See, also, *Brest v. Lever*, 1841.

⁶ But see "The Transfer of Land Act, 1862" (25 & 26 V. c. 53), § 9, and

"The Land Transfer Act, 1875" (38 & 39 V. c. 87), § 18, both of which statutes, for purposes of registration of title, recognise an opposite presumption, unless, in the description of the land, mines or minerals be expressly mentioned.

⁷ *Rowe v. Grenfel*, 1824 (Ld. Tenterden); *Rowe v. Brenton*, 1828; *Hodgkinson v. Fletcher*, 1781.

⁸ *Keyse v. Powell*, 1853; *Smith v. Lloyd*, 1854 (Parke, B.).

§ 126. The presumption of title arising from possession will always be much strengthened by proof of uninterrupted enjoyment for a considerable time. In many cases, indeed, the legislature has, as before observed,¹ fixed what periods of undisturbed possession will suffice to confer an absolute title. In such cases, when the party by his pleading shows that he relies upon the statutory limitation, no lapse of time but that of the full period fixed by Act of Parliament will justify a presumption in support of the claim.² If, however, a party, instead of depending upon the statute-law, relies (as he may do) upon common-law presumption, or a lost grant, enjoyment for a less period than the statutory number of years, when coupled with *other circumstances*, will warrant a jury in finding a verdict in his favour.³

§ 127. The principles of legal presumption which we have just been discussing apply, indeed, to all cases to which the statutes of limitation do not extend, though in many of them they are of necessity only capable of a vague interpretation. For instance, though (as we have just incidentally seen⁴) a plaintiff seeking to recover land is bound to establish his own title, he will not be required to prove strictly every successive link in it, provided that the property has been long in his possession. Therefore, when a person claiming under a feoffment proved that he had had uninterrupted enjoyment of the premises for twenty years, the court and jury presumed, in his favour, that the necessary formalities of the old livery of seisin had been complied with.⁵ Presumptions of this latter nature will not, however, now be raised, where the land has been held for a less period than twelve years,⁶ nor will they, where the acts of the parties, or the other facts in the case, lead to a different inference.⁷

§ 127A. Another disputable presumption of law is that arising from the possession of stolen property *recently* after the commission of a theft. Such possession raises a *prima facie* presumption that

¹ Ante, § 74.

² See 2 & 3 W. 4, c. 71, § 6 ("The Prescription Act, 1832"); 2 & 3 W. 4, c. 100, § 8; *Eldridge v. Knott*, 1774; *Lowe v. Carpenter*, 1851.

³ See *Wheaton v. Maple & Co.*, 1893; *Bright v. Walker*, 1834 (Parke, B.); *Ld. Stamford v. Dunbar*, 1845; *Lowe v. Carpenter*, 1851 (Parke, B.); *Hammer v. Chance*, 1865 (Ld. West-

bury).

⁴ Ante, § 125.

⁵ *Rees v. Lloyd*, 1811; *Doe v. Cleveland*, 1829; *Doe v. Davies*, 1837; *Doe v. Gardiner*, 1852.

⁶ 37 & 38 V. c. 57 ("The Real Property Limitation Act, 1874"); and see cases in last note.

⁷ *Doe v. Gardiner*, 1852.

the possessor was either the thief, or the receiver, according to the other circumstances of the case.¹ This presumption, though rebuttable, is, when unexplained,² either by direct evidence, or by the character and habits of the possessor, or otherwise, usually regarded by the jury as conclusive.³ The question as to what amounts to recent possession, varies according as the stolen article is or is not calculated to pass readily from hand to hand. Thus, where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of a prisoner two months after they had been stolen, it was held that the prisoner should explain how he came by the property.⁴ But, on the other hand, where the only evidence against a prisoner was, that certain tools had been traced to his possession three months after their loss, an acquittal was directed;⁵ and a similar course was pursued on an indictment for horse-stealing, where the horse was not discovered in the custody of the accused until after six months from the date of the robbery;⁶ and where goods, lost sixteen months before, were found in the prisoner's house, but no other evidence was adduced against him, he was not called upon for his defence.⁷ The finding of stolen property in the *house* of the accused, provided there were other inmates capable of committing the larceny, will, moreover, be *of itself* insufficient to prove *his* possession, however recently the theft may have been effected;⁸ though, if coupled

¹ *R. v. Langmead*, 1864.

² *R. v. Exall*, 1866 (Pollock, C.B.).

³ 2 East, P. C. 656; *R. v. —*, 1826; *The State v. Adams*, 1789—1806 (Am.). “*Furtum præsumitur commissum ab illo, penes quem res furata inventa fuerit, adeo ut si non docuerit à quo rem habuerit, justè, ex illà inventione, poterit subjici tormentis.*” 2 Masc. de Prob. concl. 834; Menoch. de Præs. lib. 5, præ. 31. See ante, § 63.

⁴ *R. v. Partridge*, 1836 (Patteson, J.).

⁵ *R. v. Adams*, 1828 (Parke, J.). See *R. v. Cocking*, 1836, where two sacks were found in the prisoner's possession twenty days after they had been missed; and Coleridge, J., left the question to the jury, observing, that “stolen property usually passes through many hands.” See the observations of the reporter on this

presumption, *id.*

⁶ *R. v. Cooper*, 1852 (Maule, J.); *R. v. Harris*, 1860 (Channell, B.).

⁷ *R. v. —*, 1826 (Bayley, J.).

⁸ 2 St. Ev. 614, n. (g). See *Ex parte Ransley*, 1823, where the bare finding of smuggled spirits in defendant's house, during his absence from home, was held insufficient to support a conviction under 11 G. 1, c. 30, § 16 (now repealed by 30 & 31 V. c. 59), for knowingly harbouring and concealing. Abbott, C.J., observed, “The mere naked fact of the spirits being found in the defendant's house during his absence cannot be considered as conclusive evidence of knowledge to support a conviction on this statute. There is abundant ground for suspicion, but we cannot say that it is a clear and satisfactory ground to convict.” See, also, *R. v. Hale*, 1778.

with proof of other suspicious circumstances, it may fully warrant the conviction of the accused.¹

§ 127B. This presumption is in all cases one of *fact* rather than of law. It is occasionally so strong as to render unnecessary any direct proof of what is called the *corpus delicti*. Thus, to borrow an apt illustration from Maule, J., if a man were to go into the London Docks quite sober, and shortly afterwards were found very drunk, staggering out of one of the cellars, in which above a million of gallons of wine are stowed, "this would be reasonable evidence that the man had stolen some of the wine in the cellar, though no proof were given that any particular vat had been broached, and that any wine had actually been missed."²

§ 127c.³ The presumption under discussion is not confined to charges of theft, but extends to all charges, however penal. Thus, on an indictment for arson, proof that property, which was in an house at the time it was burnt, was soon afterwards found in the possession of the prisoner, raises a probable presumption that he was present and concerned in burning the house;⁴ and under similar circumstances a like inference arises in the cases of murder accompanied by robbery,⁵ of burglary,⁶ and of the possession of a quantity of counterfeit money.⁷

§ 128. The maxim, "*ex diuturnitate temporis omnia præsumuntur ritè et solemniter esse acta*," is also of great importance. It is a presumption of law that where there has been long continued possession in assertion of a right, the right must be presumed to have had a legal origin if such a legal origin was possible, and that all those acts were done and the circumstances existed which were necessary to the creation of a valid legal title.⁸ It is also a presumption of law that *all* transactions were originally legal and honest, while the older they are the stronger will be the presumption.⁹ Such presumption indeed is sometimes, and under certain circumstances, conclusive. An instance of this has already been furnished¹⁰

¹ R. v. Watson, 1817 (Ld. Ellenborough and Abbott, J.).

² R. v. Barton, 1854. See, also, R. v. Mockford, 1868. See, however, R. v. Williams, 1871; sed qy. this case.

³ Gr. Ev. § 34.

⁴ R. v. Rickman, 1789.

⁵ Wills, Cr. Ev. 61.

⁶ See R. v. Gould, 1840; R. v.

Exall, 1866.

⁷ R. v. Fuller, 1816; R. v. Jarvis, 1855.

⁸ Phillips v. Halliday, 1891 (Ld. Herschell).

⁹ Croft v. Rickmansworth Highway Board, 1888; Postlethwaite v. Rickman, 1889 (C.A.) (Bowen, L.J.).

¹⁰ Ante, § 87.

in the case of ancient documents, the due execution of which will be presumed on their mere production. And the American courts recognise other applications of the rule. Thus, after¹ the lapse of twenty years, they conclusively presume, in favour of every judicial tribunal which has acted within its jurisdiction, that all persons interested in its proceedings have had due notice.² They have also held, that where an authority is given by law to executors, guardians, and other officers, to make sales of lands upon being duly licensed by the courts, but they are required to advertise the sales in a particular manner, and to observe other formalities, the lapse of sufficient time (which in most cases is fixed at thirty years) raises a conclusive presumption that all the legal formalities were observed;³ the licence to sell, and the official character of the vendor, being provable by record or judicial registration, must in general be so proved; and the deed must also be proved in the usual manner; but the intermediate proceedings are presumed. *Probatis extremis præsumentur media*. And in England the valid existence of a bye-law will be inferred without any direct proof of its having been passed, or of the loss of it, but the court will infer its existence from a usage of long standing.⁴

§ 129. The maxim, “ex diuturnitate temporis omnia præsumentur ritè esse acta” has, indeed, since the passing of the Vendor and Purchaser Act, 1874,⁵ become one of the leading rules, which are henceforth to regulate the practice of conveyancers and the rights of vendors and purchasers. And by the Conveyancing and Law of Property Act, 1881,⁶ it is enacted that the purchaser of any property “shall assume, unless the contrary appears, that the recitals contained in the abstracted instruments of any deed, will, or other document forming part of the title [prior to the time prescribed by law

¹ Largely, Gr. Ev. §§ 19 and 20.

² Brown v. Wood, 1820 (Am.).

³ See Pejepscot Prop's v. Ransom, 1817 (Am.); Blossom v. Cannon, 1817 (Am.); Colman v. Anderson, 1813 (Am.); Williams v. Eyton, 1859; Gray v. Gardiner, 1807 (Am.), holding an interval of twenty-two years sufficient. See cases collected, Broom's Legal Maxims (6th edit. p. 890), tit. “Omnia Præsumentur, &c.”; Society, &c. v. Wheeler, 1814 (Am.).

⁴ R. v. Powell, 1854; May, of Hull v. Horner, 1779 (Ld. Mansfield). See

Johnson v. Barnes, 1873 (Ex. Ch.).

⁵ 37 & 38 V. c. 78. Provisions almost identical with those in the text contained in the Act of 1881 are contained in § 2, subs. 2, of the Act of 1874, and are said, in the tabular index to statutes for that year (which is of no authority however), to be repealed by the Act of 1881, but they are not mentioned in the repealing portions (viz., § 7, and Sched. II. Part III.) of the Act of 1881.

⁶ 44 & 45 V. c. 41, § 3, subs. 3.

for its commencement] are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, inrolment, or otherwise.” The time prescribed by law for the commencement of the title may be fixed by express stipulations, and it is always desirable to so fix it, at the same time stating the nature of the instrument with which the title commences.¹ In the absence of stipulation,¹ abstracts of title in general² commence, as to freeholds, with a document at least forty years old;³ as to leaseholds for years, with the lease or underlease;⁴ as to the freehold interest in enfranchised copyholds or customary freeholds, with the deed of enfranchisement.⁵

§ 130. The presumption afforded by the maxim, “*ex diuturnitate temporis omnia præsumuntur ritè esse acta*,” has again an important application where the rights of the Crown are concerned. Here,⁶—though lapse of time does not of itself furnish a conclusive legal bar to the title of the Sovereign,—yet, if the adverse claim could have had a legal commencement, juries are instructed or advised to presume such commencement, after many years of uninterrupted possession. Accordingly, royal grants, charters, and even Acts of Parliament, have not infrequently been thus found by the jury, after long-continued peaceable enjoyment, accompanied by the usual acts of ownership;⁷ the long enjoyment of port duties, tolls, customary dues, fees, or the like, will, if the nature of the case admits it,⁸ be held to warrant the presumption of any fact necessary to make them legal;⁹ while if distinct

¹ Wolstenholme & Brinton's Conveyancing Act, 6th edit., p. 2.

² See Bolton v. London School Board, 1878.

³ Vendor and Purchaser Act (37 & 38 V. c. 78), § 1.

⁴ Id. § 2, r. 1; and “The Conveyancing and Law of Property Act, 1881” (44 & 45 V. c. 41), § 3, subs. 1.

⁵ Id. subs. 2.

⁶ Gr. Ev. § 45, in part, as to nine lines.

⁷ Goodman v. Mayor of Saltash, 1882 (C. A.); R. v. Brown, 1779; May. of Hull v. Horner, 1779; Eldridge v. Knott, 1774; Lopez v. Andrew, 1826; Delarue v. Church, 1833; O'Neill v.

Allen, 1859 (Pigot, C.B.) (Ir.); Doe d. Devine v. Wilson, 1855 (P. C.); Little v. Wingfield, 1859 (Ir.); Roe v. Ireland, 1809; Goodtitle v. Baldwin, 1809; Att.-Gen. v. Ewelme Hospital, 1853; Mather v. Trinity Church, 1877 (Am.).

⁸ See Gann v. Free Fishers of Whitstable, 1864 (H. L.); Free Fishers of Whitstable v. Gann, and Gann v. Johnson, 1863 (Ex. Ch.); Bryant v. Foot, 1868; Lawrence v. Hitch, 1868. See, also, Mills v. May. of Colchester, 1867; Forman v. Free Fishers of Whitstable, 1869 (H. L.).

⁹ May. of Exeter v. Warren, 1844 (Ld. Denman).

evidence of any such payments be given as far back as living memory goes, the jury, unless evidence to the contrary be shown, will not only be quite justified in presuming, but will be directed to presume, that such payments were immemorial, or at least were referable to a legal origin;¹ and a series of acts of ownership exercised on the seashore by an adjoining proprietor, or the production by him of a royal grant conveying the right of wreck,² affords abundant evidence for a jury to presume that the Crown formerly granted the soil to one of his ancestors.³ On the same principle, after evidence of possession for nearly forty years of a tract of land, of a prior order in council for a survey and of an actual survey, a jury has, in America,⁴ been instructed to presume that a patent was duly issued. A longer period is, however, usually required for this presumption to arise with regard to Crown or public grants than is needed in the case of a grant by a private individual.⁵

§ 131. Again, on the same principle, the uninterrupted user of a road by the public for forty or fifty years justifies a presumption in favour of the original *animus dedicandi*, although there was ground for supposing that the soil of the highway was vested in the Crown,⁶ and this although it is a rule that, to constitute a valid dedication to the public of a highway, the owner of the soil must intend to dedicate.⁷ Even a qualified or partial dedication of a way may be presumed from continuous use. Accordingly; where, as far back as living memory goes, the public have enjoyed a right of way across an arable field, and the owner has ploughed up the whole field, including the path, it is presumed that the original dedication of the way was subject to the right of ploughing it up in due course of farming,⁸ and therefore the public had no right of deviating from it, although the path may have become temporarily impassable in consequence of being so ploughed.⁹ Where, too, the

¹ *Malcomson v. O'Dea*, 1862 (H. L.); *Mills v. May*, of Colchester, 1867; *D. of Beaufort v. Smith*, 1849 (Parke, B.); *Pelham v. Pickersgill*, 1787 (Ashurst, J.); *Shephard v. Payne*, 1863 (Ex. Ch.).

² *Hale de Jure Mar.* 25, recognised in *Calmady v. Rowe*, 1848.

³ *Calmady v. Rowe*, 1848; *D. of Beaufort v. May*, of Swansea, 1849; *Le Strange v. Rowe*, 1865 (Erle, C.J.); *Healy v. Thorne*, 1870 (Ir.). See *nate*, § 119.

⁴ *Jackson v. McCall*, 1813 (Am.).

⁵ See *Mascart de Prob.*, p. 239; concl. 199, n. 11, 12.

⁶ *R. v. East Mark*, 1848; *R. v. Petrie*, 1855; *Turner v. Walsh*, 1881 (P. C.). See *Greenwich Board of Works v. Maudslay*, 1870; *Powers v. Bathurst*, 1880 (Fry, J.).

⁷ *Poole v. Huskinson*, 1843.

⁸ *Mercer v. Woodgate*, 1870; *Arnold v. Blaker*, 1871.

⁹ *Arnold v. Holbrook*, 1873.

facts proved leave room for such a presumption, property which a parish has enjoyed for a long period may be presumed to be vested in trustees for such parish.¹

§ 132. In cases of incorporeal hereditaments, where it is desirable to raise a presumption of lost grant, juries should not be required to find as a fact that a deed of grant has been *actually* executed, but without believing any grant to have been made, they may often, under the instruction of the court, presume its existence for the simple purpose of *quieting possession*.² Such a presumption may be sometimes raised even against a reversioner, provided it can be either directly proved, or reasonably inferred, that he has had full knowledge of his opponent's actual enjoyment of the right in question, and has tacitly assented thereto.³ But the presumption of a grant can only arise when the person against whom the right is claimed might have interrupted or prevented the user relied on.⁴ Therefore, the grant of a right to the uninterrupted passage of air to a windmill from over the soil of a neighbour, cannot be presumed from an uninterrupted use of the mill for forty years.⁵

§ 133.⁶ Juries are also sometimes advised to presume conveyances of *corporeal* hereditaments between private individuals, in favour of the party who has proved a right to the beneficial ownership, and whose undisturbed possession, being consistent with the existence of the conveyance required to be presumed, affords reasonable ground for belief that the legal title has in fact been conveyed.⁷ This presumption is made in order to prevent an apparently just title from being defeated by mere formal matter.⁸ It ought only to be drawn where a party has shown a right good in substance, but in some way technically deficient in form.

¹ Haigh v. West, 1893 (C. A.).

² Deeble v. Linehan, 1860 (Ir. Ex. Ch.), following the dicta of Ld. Mansfield in Eldridge v. Knott, 1774; and of Ld. Wensleydale in Bright v. Walker, 1835; and in Magdalen Coll. v. Att.-Gen., 1857; and overruling a dictum of Bayley, B., in Day v. Williams, 1832; Little v. Wingfield, 1859 (Ir.).

³ Deeble v. Linehan, 1860 (Ir. Ex. Ch.); Winterbottom v. Ld. Derby, 1867.

⁴ Chasemore v. Richards, 1859 (H. L.).

⁵ Webb v. Bird, 1863 (Ex. Ch.); Bryant v. Lefever, 1879 (C. A.).

⁶ Gr. Ev. § 46, in part.

⁷ Doe v. Cooke, 1829 (Tindal, C.J.). See Doe v. Millett, 1848, and cases there cited.

⁸ Doe v. Cooke, 1829 (Tindal, C.J.); Doe v. Sybourn, 1796 (Ld. Kenyon). In Little v. Wingfield, 1859 (Ir.), a passage in Doe v. Cooke (supra), in which Tindal, C.J., states in what cases this presumption may be made, is called in question, as laying down the law too narrowly.

§ 134. A presumption in favour of such a conveyance having been made will, in general, prevail whenever it was the *duty* of trustees to convey to the beneficial owner at a specified time, as upon his attainment of the age of majority, or on the death of a cestui que vie, or after the payment of debts, legacies, portions, or the like, for in such cases it is reasonable to presume that the trustees have performed their duty, and have done what a court of equity would compel them to do.¹ A like presumption probably arises where the duty to convey, though not *express*, may *constructively* be gathered from the object of the trust, as, for instance, where an estate is vested in trustees for a temporary purpose, which has been attained, and no further intention is declared, or can reasonably be inferred, requiring the legal estate to remain outstanding.²

§ 135. It is said (probably rightly) that this presumption will never be made *against* the owner of the inheritance, save in cases where he has attempted to defeat the solemn acts of himself, or of those through whom he claims. If, however, a mortgagor attempt to set up an outstanding fee as against a mortgagee for years, or the appointee of a devisee in fee to dispute the right of a former devisor to grant a lease of the premises in question, on the ground that the legal estate was, at the time of the grant, outstanding in a trustee, the jury (even if in cases the estoppel is not pleaded) may presume a conveyance. In the first case,³ the presumption will be made in favour of the honesty of the mortgagor at the time of the mortgage, though against his interest at the time of the trial; and in the second,⁴ it will prevail, in order to give effect to the grant of the devisor, which would otherwise be void.

§ 136. Questions under this head of presumptions frequently arose in former times, when juries used often to be called upon to

¹ *England v. Slade*, 1792; *Doe v. Sybourn*, 1796; *Wilson v. Allen*, 1820 (Sir T. Plumer); *Emery v. Grocock*, 1821 (Sir J. Leach). In *England v. Slade*, a conveyance from the trustees was presumed, though only *three years* had elapsed from the time when they ought to have conveyed.

² *Hillary v. Waller*, 1805 (Sir W. Grant); *Doe v. Lloyd*, 1806 (Lawrence, J.). See Sug. V. & P. (14th edit.), 399; Math., Pres. Ev. 215—217.

³ Per Abbott, C.J., in *Doe v. Hilder*, 1819; *Cottrell v. Hughes*, 1855.

⁴ *Bartlett v. Downes*, 1825 (Abbott, C.J.).

presume the surrender of *outstanding satisfied terms*; ¹ but an Act,² passed in 1845, provides that every satisfied term of years, which, *either by express declaration or by construction of law*,³ shall, upon the 31st day of December, 1845, be attendant upon the inheritance or reversion of any land, shall on that day absolutely cease and determine as to the land, upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by *express declaration*, although thereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said 31st day of December, 1845, and shall, for the purpose of such protection, be considered in every court of law and of equity to be a subsisting term. It also provides⁴ that every term of years now subsisting or hereafter to be created, becoming satisfied after the said 31st of December, 1845, and which by express declaration or construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall, immediately upon the same becoming so attendant, absolutely cease and determine as to the land, upon the inheritance or reversion whereof such term shall become attendant as aforesaid.⁵

§ 137. Notwithstanding this Act, it is perfectly clear that no presumption can be allowed in favour of the surrender of a term which is still *unsatisfied*,⁶ or the *continuance* of which is found in a special verdict, or admitted in a special case;⁷ for, whatever individual hardship may result, it is obviously absurd to permit any inference to be drawn, which is directly opposed, either to the ascertained fact, or to all reasonable belief.⁸

§ 138. A jury may also, under certain circumstances, presume

¹ See *Garrard v. Tuck*, 1849; *Doe v. Langdon*, 1848.

² 8 & 9 V. c. 112.

³ See *Doe v. Price*, 1847; *Doe v. Mouldsdales*, 1847; *Doe v. Jones*, 1849; *Cottrell v. Hughes*, 1855; *Plant v. Taylor*, 1863.

⁴ § 2.

⁵ As to the construction of this

Act, see § 3.

⁶ *Doe v. Staple*, 1788, where the lessor of the plaintiff was heir-at-law, and only claimed the premises subject to the charge.

⁷ *Goodtitle v. Jones*, 1796; *Roe v. Reade*, 1799.

⁸ See per *Bayley, J.*, in *R. v. Upton Gray*, 1830.

the surrender of a lease by operation of law. The production by the lessor of a cancelled lease will not, indeed, warrant the presumption of such a surrender as will satisfy the Statute of Frauds.¹ Yet, when the production of the cancelled lease was coupled with proof that a new lease had been granted to another party, who, like the former lessee, was a mere trustee for the same *cestuis que trust*, and it further appeared, that when leases were renewed from time to time, the usage was to send in the old lease to be cancelled in the lessor's office, the jury were allowed to infer that the second lease was granted with the assent of the former tenant.² The unexplained payment of an abated rent for thirty years by a tenant of premises, which were shown to have been leased to another party for an unexpired term, has been treated in Ireland as evidence from which a jury might presume the surrender of the original lease, and the creation of a new tenancy from year to year, at the abated rent, in favour of the present occupier.³

§§ 139—142. The principle "*ex diuturnitate temporis omnia præsumuntur ritè esse acta*" has also been applied in a variety of matters other than those mentioned above. Thus, where ejectment was brought to recover a messuage, demised for a long term by a lease containing a covenant that the house should not be used as a shop without the lessor's written consent, with a proviso for re-entry on breach of such covenant, it was held that, on proof of the uninterrupted user of the premises as a beershop for twenty years, the jury ought to be directed to presume that a licence in writing had been duly given;⁴ after the lapse of sixty years, the court, in the absence of any direct evidence, has presumed that executors, who were proved to have renounced, had also disclaimed an estate in a chattel real, which had been bequeathed to them by the testator;⁵ and it is a general proposition,⁶ that stale demands ought always to be regarded in courts of justice with jealous suspicion,⁷ and that long acquiescence in any adverse claim of

¹ *Doe v. Thomas*, 1829; *Roe v. Abp. of York*, 1805.

² *Thomas v. Cook*, 1818. See, also, *Walker v. Richardson*, 1837. See post, §§ 1009, 1010.

³ *Lefroy v. Walsh*, 1851 (Ir.). See, also, *Tennent v. Neil*, 1870 (Ir. Ex. Ch.); *Ex parte Raymond*, 1874 (Ir.).

⁴ *Gibson v. Doeg*, 1858.

⁵ *M'Kenna v. Eager*, 1875 (Ir.).

⁶ Gr. Ev. § 47, in great part.

⁷ *Sibbering v. Ld. Balcarras*, 1850. See H., falsely called C., *v. C.*, 1862; *T. v. D.*, falsely called D., 1866. Thus, too, the non-user of a patent for a series of years raises a strong pre-

right is good ground, on which a jury may presume that the claim had a legal commencement;¹ since it is contrary to general experience for one man long to continue to pay money to another, or to perform any onerous duty, or to submit to any inconvenient claim, unless in pursuance of some contract, or other legal obligation.²

§ 143-4. In the great majority of cases to which the maxim "*ex diuturnitate temporis omnia præsumuntur ritè esse acta*" applies it is only available, "*donec probetur in contrarium*."³ The application of the presumption arising from it to *acts* of an *official* or *judicial* character will be best illustrated by referring to one or two decisions.⁴ For instance, where successive decisions are inconsistent with a general order of the court, a reversal of that order ought to be presumed;⁵ on an indictment for perjury proof of the signatures of the defendant, and of the official before whom the document purports to have been sworn, is sufficient evidence that the defendant was regularly sworn to the truth of its contents, though the clerk, who proves the handwriting of the official, has no recollection of administering the oath, and admits that the jurat was not written by himself;⁶ the fact that a town was in the military occupation of an enemy, and proclamations, purporting to be signed by the general in command, posted on its walls, is evidence whence a jury may infer that the placards had been printed and posted by the authority of the commander;⁷ on an indictment for bigamy, proof of the solemnization of the first marriage in a Wesleyan chapel in the presence of the registrar, and of the entry of such marriage in his book, raises a *primâ facie* presumption that the chapel was duly registered;⁸ and so also proof by a witness present at it, that a marriage was solemnized in a parish church by the curate of the parish, renders it unnecessary to prove either the

sumption of its practical inutility: *Re Allan's Patent*, 1867, P. C.; *Re Bakewell's Patent*, 1862, P. C.; *Re Hughes' Patent*, 1879, P. C.

¹ See *Re Birch*, 1853.

² See *Castleden v. Castleden*, 1861, H. L.; *Ogilvie v. Currie*, 1868 (Ld. Cairns, Ch.).

³ See *R. v. Bjornsen*, 1865.

⁴ See, also, *Lee v. Johnstone*, 1869.

⁵ *Bohun v. Delessert*, 1813 (Ld. Eldon); *Man v. Ricketts*, 1845 (Ld. Lyndhurst).

⁶ *R. v. Benson*, 1810 (Ld. Ellenborough). See, also, *Cheney v. Courtois*, 1863; and *Re Chapman*, Ex parte Johnson, 1884, C. A.

⁷ *Bruce v. Nicolopulo*, 1855.

⁸ *R. v. Mainwaring*, 1857; *Sichel v. Lambert*, 1864; *R. v. Cradock*, 1863 (Willes, J., and Pollock, C.B.).

registration of the marriage, or the fact of any licence having been granted, or of any banns having been published ;¹ and the constant performance of divine service from an early period in a chapel, raises a *primâ facie* presumption that it has been duly consecrated.²

§ 144A. An Irish decision carried this presumption to its extreme limit. There a shopkeeper (prior to the passing of the Weights and Measures Act, 1878)³ was prosecuted for using weights which were light when compared with the county standard. Proof that the county standard had been compared with the imperial standard within the last five years, although such comparison was expressly required by statute, was held unnecessary, on the ground that the *primâ facie* presumption was that the officials in charge of the local standards had performed their duty.⁴

§ 145. Again, the court presumed the regularity of the proceedings, and that the writ had in due course come to the gaoler through the coroner, on a motion to discharge out of custody a party detained for debt in the sheriff's gaol, made on the ground of irregularity in the proceedings, although it did not appear that a writ of *ca. sa.* at the suit of the sheriff, which was in the hands of the governor of the gaol, had ever been in the coroner's hands, such writ having been set out in a return which the gaoler had made to a writ of *habeas corpus* previously issued, together with a certificate by the coroner, that the copy of the writ was a true one.⁵ The court has also presumed that a parish certificate purporting to be granted by A, the only churchwarden, and B, the only overseer of the parish, sixty years previously, during which the appellant parish had submitted to such certificate, was regular, and that, by custom, there was only one churchwarden in the parish, and that two overseers had been originally appointed, but that one of them was dead, and his vacancy not filled up at the date of the certificate ;⁶ in favour of the regularity of a parish indenture of apprenticeship, signed only by one churchwarden and one overseer ;⁷ in favour of

¹ *R. v. Allison*, 1806. See *Limerick v. Limerick*, 1863.

² *Rugg v. Kingsmill*, 1867 ; *R. v. Cresswell*, 1876.

³ 41 & 42 V. c. 49 ; amended by 52 & 53 V. c. 21.

⁴ *Hill v. Hennigan*, 1877 (Ir.).

⁵ *Bastard v. Trutch*, 1835.

⁶ *R. v. Catesby*, 1824. See also, *R. v. Whitechurch*, 1827. From *R. v. Upton Gray*, 1830, it appears that this presumption is rather one of *fact* than of *law*.

⁷ *R. v. Hinckley*, 1810 ; *R. v. Stainforth*, 1845.

deeds of parish apprenticeship—that where such a deed had been allowed by justices as required by the then law, in the absence of evidence to the contrary, it must be taken that notice had been duly given to the officers of the parish, where the apprentice was to serve;¹ that where such a deed, certified by the allowance of the justices, contained a recital of the order of binding, no evidence of such order, beyond the indenture itself, is necessary,² and that where an apprentice had served his time under a deed executed thirty years before, and it was proved both that such deed was lost, and that the parish in which the pauper was settled under it had relieved him for the last twelve years, it must be presumed that the deed was properly stamped, though the stamp officers proved that it did not appear in their office that any such indenture had been stamped during the last thirty-one years.³

§ 146. On this same principle of “omnia præsumuntur ritè esse acta,” every reasonable intendment will be made in support of an order of justices, provided it appear on the face of the order that the justices had jurisdiction.⁴ But this rule does not extend to convictions, which, as combining summary power with penal consequences, are watched with peculiar vigilance, and construed with strictness at least as great as indictments.⁵ Still, even with respect to convictions, if the *authority* of the magistrate can be distinctly collected from the facts stated on the record, the court will not be *astute* in discovering irregularities in the proceedings. The safest rule on the subject is that laid down by Lord Ellenborough, that the court “*can* intend nothing in favour of convictions, and *will* intend nothing against them,”⁶ and the conviction or order will be construed according to the very language employed in it.⁷

¹ R. v. Whiston, 1836; R. v. Witney, 1836.

² R. v. Stainforth, 1845. See also R. v. St. Mary Magdalen, 1853; R. v. Broadhempston, 1859.

³ R. v. Long Buckby, 1805. Both this case, and R. v. Catesby, 1824, cited above, partly rested on the presumption of validity arising from long acquiescence. See ante, §§ 126—131, 139.

⁴ R. v. Morris, 1792 (Ld. Kenyon); Ormerod v. Chadwick, 1847; R. v.

Preston, 1848; R. v. Stainforth, 1845.

⁵ R. v. Morris, 1792; R. v. Baines, 1706; Fletcher v. Calthrop, 1845; R. v. Little, 1758 (Ld. Mansfield); R. v. Corden, 1769, where the court observed that “a tight hand ought to be holden over these summary convictions:” R. v. Pain, 1826 (Abbott, C.J.); R. v. Daman, 1819.

⁶ R. v. Hazell, 1810. See Paley on Conv. 74—77.

⁷ R. v. Helling, 1715, 1716 (Pratt, C.J.); Christie v. Unwin, 1840 (Cole-

§ 147. Neither does the rule that “*omnia præsumuntur ritè esse acta*” apply, so as in any event to *give jurisdiction* to authorities acting judicially under a special statutory power; but in all such cases every circumstance required by the statute to give jurisdiction *must* appear on the face of the proceedings, either by direct averment, or by reasonable intendment.¹ There is no distinction, in this respect, between convictions, commitments,² inquisitions, warrants to arrest, examinations, or orders;³ and whether an order under a special act be made by the Lord Chancellor or by a justice of the peace, the facts which gave the authority must be stated.⁴ A presumption that an Ecclesiastical Court will exceed its jurisdiction will not be made.⁵ On the same principle the courts refuse to anticipate the decision of the master on a question of costs, as they cannot presume that he will decide erroneously.⁶

§ 147A. The presumption under consideration is ignored in the case of highway rates. In such cases, although its recognition would have been productive of much public advantage, the production of the official book, with the rate duly entered in it and allowed, does not even furnish at least *primâ facie* evidence of a highway rate; and the fact that it has been duly published must still be proved by independent evidence.⁷ With regard to poor-rates, however, it has been expressly enacted, that “the production of the book purporting to contain a poor-rate, with the allowance of the rate by the justices, shall, if the rate is made in the form prescribed by law, be *primâ facie* evidence of the due making and publication of such rate.”⁸

§ 148. The doctrine that “*omnia præsumuntur ritè esse acta*”

ridge, J.); *In re Clark*, 1842 (Ld. Denman.).

¹ *R. v. All Saints, Southampton*, 1828 (Holroyd, J.); *Gosset v. Howard*, 1847; *R. v. Helling*, 1715, 1716 (Pratt, C. J.); *R. v. Totness*, 1849; *R. v. Hulcott*, 1796, and note to § 147, *infra*.

² But a warrant of commitment which purports to be founded on a preceding conviction will be good, though it does not state that the evidence was given on oath, or in the presence of the prisoner: *Ex parte Bailey*, and *Ex parte Collier*, 1854.

³ *Day v. King*, 1836 (Williams, J.); *Brook v. Jenney*, 1841 (per id.); *Johnson v. Reid*, 1840; *Gosset v. Howard*, 1847.

⁴ *Christie v. Unwin*, 1840 (Coleridge, J.).

⁵ *Chesterton v. Farlar*, 1838; *Hall v. Maule*, 1838; *Hallack v. U. of Cambridge*, 1841.

⁶ *Head v. Baldry*, 1838.

⁷ *Bird v. Adcock*, 1878.

⁸ “The Poor Rate Assessment and Collection Act, 1869” (32 & 33 V. c. 41), § 18.

is, in many instances, recognised in support of the solemn *acts* of even *private* persons. For instance, if an act can only be lawful after the performance of some prior act, due performance of that prior act will be presumed.¹ Again, although, in the case of contracts not under seal, a consideration must in general be averred and proved, *bills of exchange* and promissory notes are *primâ facie* presumed to be founded on valuable consideration,² this latter presumption being made partly because it is important to preserve the negotiability of such instruments intact, and partly, because the existence of a valid consideration may reasonably be inferred from the solemnity of the instruments themselves, and the deliberate mode in which they are executed.³ The following are further examples of presumptions: if secondary evidence be tendered to prove the contents of an instrument either lost or detained by the opposite party after notice to produce it, it will be presumed that the original was duly stamped, unless some evidence to the contrary, as, for example, that it was unstamped when last seen,⁴ can be given;⁵ under the Leases and Sales of Settled Estates Act, 1877, the execution of a lease by the lessor furnishes sufficient presumptive evidence that the counterpart has been duly executed by the lessee;⁶ where lands originally leasehold have been dealt with as freehold for a long period by persons in possession, as between parties claiming under such persons, a presumption will be raised that the reversion has been got in;⁷ in the absence of all proof as to which of two deeds of even date was first executed, the court will presume in favour of that order of priority which will best support the clear intent of the parties;⁸ and where an act has been done by a joint stock company, to the legality of which certain formalities are requisite, and the circumstances are such

¹ *King's County v. Neath National Bank*, 1893 (Am.).

² 45 & 46 V. c. 61, § 30; *Collins v. Martin*, 1797; *Holliday v. Atkinson*, 1826; *Story, Bills*, §§ 16, 178. See ante, § 86.

³ *Story, Bills*, §§ 16, 178.

⁴ *Marine Investment Co. v. Havinside*, 1872, H. L.

⁵ *Hart v. Hart*, 1842 (Wigram, V.-C.); *Crowther v. Solomons*, 1848; *Pooley v. Goodwin*, 1835; *Crisp v.*

Anderson, 1815; *R. v. Long Buckby*, 1805; *Closmadeuc v. Carrel*, 1856. See *Arbon v. Fussell*, 1862; *Connor v. Cronin*, 1858 (Ir.); *Herbert v. Rae*, 1862 (Ir.) (Smith, M.R.); 33 & 34 V. c. 46, § 58, Ir.

⁶ 40 & 41 V. c. 18, § 48.

⁷ *Holmes v. Milward*, 1878 (Fry, J.).

⁸ *Taylor v. Horde*, 1757. See *R. v. Ashburton*, 1846; *Gartside v. Silkstone, &c. Co.*, 1882.

that acquiescence may be imputed to the shareholders, a compliance with the necessary formalities will, as against the company, be presumed.¹

§ 149. On the same principle, where the *attestation* of a *deed* has been in the usual form,² and the signature of the party has been proved, the jury will be advised to presume a due sealing and delivery, and that, too, in cases where the attesting witness has denied all recollection of any other form having been gone through beyond the mere signing.³ Indeed, it is not necessary, to constitute a valid sealing, that an impression should be made with wax or with a wafer, but an impression made in ink with a wooden block will suffice;⁴ and even though no impression at all appear on the parchment or paper, still, if the instrument purport to be a deed, is on proper stamps, and be stated in the attestation to have been duly sealed and delivered, it will, in the absence of evidence to the contrary (especially if it be an ancient instrument),⁵ be presumed to have been sealed.⁶ Evidence to the contrary will, however, be afforded where a bond, bearing no trace of any seal, and referring to contemplated testamentary dispositions which are to supersede it, is found among the papers of the *obligor*.⁷ And a transfer which bears upon it a printed circle, and within such circle the words "Place for seal," but bears no actual seal, is not a deed merely because its attestation clause says it was "signed, sealed, and delivered."⁸ But a deed executed by a corporate body need not have the corporate seal affixed to it, but the corporation may adopt any *private seal* they please for the occasion, and the jury may presume that the use of the adopted seal was a corporate

¹ Grady's case, Re The British Prov. Life and Fire Ass. Soc., 1863; Lane's case, 1863 (Ld. Westbury, C.).

² As to presumption in favour of a will having a due attestation clause, see post, § 1056.

³ Fasset v. Brown, 1861; Grellier v. Neale, 1790 (Ld. Kenyon); Talbot v. Hodgson, 1816; Hall v. Bainbridge, 1848; Burling v. Paterson, 1792 (Patteson, J.); Davidson v. Cooper, 1843 (Ld. Abinger). See, also, Doe v. Lewis, 1836; Doe v. Burdett, 1843; Newton v. Ricketts, 1861, H. L.; and Burnham v. Bennett,

1847. This presumption was formerly treated as one of law, but is now considered one of fact, and left to the jury.

⁴ R. v. St. Paul's, Covent Garden, 1845.

⁵ Crawford and Lindsay Peer., 1848, H. L.

⁶ In re Sandilands, 1871, cited by Ld. Denman in R. v. St. Paul's, Covent Garden, 1845.

⁷ Re Smith, Oswald v. Shepherd, 1892, C. A.

⁸ Re Balkis Co., 1888.

act, if the instrument purport to be executed by the head and the subordinate members of the corporation "under their seal."¹ The presumption in favour of the due execution of instruments was carried to a great length in a case^{1a} in which an action having been brought upon the assignment of certain letters-patent to recover the consideration money named therein, one of the defendants pleaded non est factum, and produced the deed, which was signed and executed by all the parties to it except himself, but with a seal placed for him in the usual way. And he having acted under the assignment, and having recognised it as a valid instrument, it was presumed that he had duly executed it.

§ 150. In accordance, again, with the maxim, "omnia præsumuntur ritè esse acta," every man is, in the absence of evidence to the contrary, presumed to know the contents of any deed which he executes,² and to be bound by it. It is, however, enacted by 13 Eliz. c. 5,³ that all conveyances of lands or chattels, which are not made for a valuable consideration and bonâ fide,⁴ shall be void as against any person, including the Crown,⁵ whose claims on the original owner of the property shall be thereby delayed or disturbed.⁶ Whenever, therefore, any transaction is sought to be invalidated under this Act, the purchaser must both establish the justice of his title, and show affirmatively, not only that the deed under which he claims was duly executed, but that it was made in perfect good faith, and also for a valuable, as contradistinguished from a mere good, consideration.⁷ In determining the question of bona fides, the jury will take into consideration all the circumstances connected with the transfer. If, therefore, the conveyance be absolute, and passes to the vendee an immediate right of possession, the fact of the vendor being allowed to continue as the apparent owner of the property naturally raises a very strong

¹ Jones v. Galway Town Commiss., 1847 (Ir.).

^{1a} Cherry v. Heming, 1849.

² In re Cooper, 1882 (Jessel, M.R.).

³ Made perpetual by 26 & 27 V. c. 125, and amended by Statute Law Revision Act, 1888 (51 V. c. 3).

⁴ See In re Ridler, Ridler v. Ridler, 1882, C. A.

⁵ Shaw v. Bran, 1816; Morewood v. Wilkes, 1833; Perkins v. Bradley, 1842. See Whitaker v. Wisbey, 1852.

⁶ See Freeman v. Pope, 1870; Crossley v. Elworthy, 1871; Cornish v. Clark, 1872 (Ld. Romilly); Kent v. Riley, 1872 (Ld. Romilly); Golden v. Gilham, 1882, C. A.; Ex parte Russell, Re Butterworth, 1882, C. A.

⁷ Twyne's case, 1602.

presumption of fraud.¹ If, indeed, the conveyance or bill of sale is by way of mortgage, and the mortgagee is not to take possession till a default in payment of the mortgage money, then, as the nature of the transaction does not call for any change of possession, the absence of such change will not of itself furnish any evidence of collusion.²

§ 150A. Bills of sale of personal chattels are, moreover, now rendered void under the Bills of Sale Act, 1882, unless they set forth the consideration for which they were given.³

§ 151. Notwithstanding the maxim, “omnia præsumuntur ritè esse acta,” whenever any person by donation derives a benefit under a deed to the prejudice of another person,⁴—and the more especially so, if any confidential or fiduciary relation subsists between the parties,—the courts so far presume against the validity of the instrument as to require some proof (varying in amount according to circumstances) of the absence of anything approaching to imposition, over-reaching, undue influence, or unconscionable advantage.⁵ For example, a deed of gift, or other disposition of property, except a will,⁶ made in favour of a solicitor by a client,⁷ of a medical attendant by a patient,⁸ of a parson by one of his congregation,⁹ of a “spiritual medium” by one of his dupes,¹⁰ of a trustee by a beneficiary,¹¹ of an executor by a legatee,¹² of a guardian by a ward, of a parent by a child,¹³ of a husband by a wife, of an agent by a principal,¹⁴ or of a shrewd man of business by an infirm ignorant old woman,¹⁵ will be regarded with jealous

¹ *Martindale v. Booth*, 1832; *Lindon v. Sharp*, 1843 (Tindal, C.J.).

² *Martindale v. Booth*, 1832.

³ 45 & 46 V. c. 43, § 8; 42 & 43 V. c. 50, § 8, Ir. As to what is a sufficient compliance with this rule, see *Ex parte Firth*, *Re Cowburn*, 1882; *Hamlyn v. Betteley*, 1880; *Hamilton v. Chaine*, 1881, C. A.; *Ex parte Rolfe*, *Re Spindler*, 1881, C. A.

⁴ *Cooke v. Lamotte*, 1851 (Romilly, M.R.). See *Coutts v. Acworth*, 1869.

⁵ 1 Story, Eq., Jur. §§ 308—323. See *Baker v. Bradley*, 1856.

⁶ *Parfitt v. Lawless*, 1872. See *Ashwell v. Lomi*, 1850.

⁷ *Gresley v. Mousley*, 1859; *O'Brien v. Lewis*, 1863; *Gardener v. Ennor*, 1866; *McPherson v. Watt*, 1877,

H. L.

⁸ *Mitchell v. Homfray*, 1881, C. A.; *Dent v. Bennett*, 1858.

⁹ *Nottidge v. Prince*, 1860; *Huguenin v. Baseley*, 1807.

¹⁰ *Lyon v. Home*, 1868 (Giffard, V.-C.).

¹¹ *Luff v. Lord*, 1864.

¹² *Gray v. Warner*, 1873 (Wickens, V.-C.).

¹³ *Wright v. Vanderplank*, 1856; *Bainbrigg v. Browne*, 1881 (Fry, J.); *Hartopp v. Hartopp*, 1855; *Dimsdale v. Dimsdale*, 1856; *Bury v. Oppenheim*, 1859; *Davies v. Davies*, 1863 (Stuart, V.-C.); *Potts v. Surr*, 1865; *Turner v. Collins*, 1871, C. A.

¹⁴ *King v. Anderson*, 1874 (Ir.).

¹⁵ *Baker v. Monk*, 1864 (L.JJ.);

suspicion, and the instrument will be set aside as conclusively void,¹ or the person benefited will have thrown upon him the burthen of establishing beyond all reasonable doubt the perfect fairness and honesty of the entire transaction.²

§ 152. A grotesque attempt was made in Ireland to extend this doctrine to a case in which a woman had, living in adultery with a married man, assigned some of her property to secure a debt owing by her paramour, and had the hardihood to afterwards apply to the Court of Chancery to set aside the assignment on the ground of undue influence. But it was held that the doctrine in question was only applicable when some lawful relation existed between the parties.³

§ 153. The old Court of Chancery used to look with peculiar favour on heirs apparent and other expectant heirs, who entered into negotiations as to their expectancies.⁴ Every person who dealt with an expectant heir for his reversion had, if the transaction were subsequently disputed, the burthen of proof upon him to establish its entire fairness.⁵ At the instance of some prominent lawyers,⁶ an Act passed in December, 1867, enacts, that “no purchase made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on the ground of under-value.”⁷ It will be noted that this enactment is carefully limited to purchases “made *bonâ fide* and without fraud or unfair dealing,” and it not only leaves untouched the law which governs unconscionable bargains, but allows under-value to be still regarded by the court as a material element in cases where fraud is charged.⁸

Summers v. Griffiths, 1866; *Slator v. Nolan*, 1876 (Ir.).

¹ *Tomson v. Judge*, 1855. This was the case of a deed of gift by a client to his solicitor.

² 1 Story, Eq. Jur. §§ 308—323; *Hunter v. Atkins*, 1832; *Nedby v. Nedby*, 1852; *Hoghton v. Hoghton*, 1872; *Grosvenor v. Sherratt*, 1860; *Savery v. King*, 1856, H. L.; *Espey v. Lake*, 1852; *Billage v. Southee*, 1852. See *Price v. Price*, 1852; *Toker v. Toker*, 1863; *Phillips v. Mullings*, 1871, C. A.; *King v. Anderson*, 1874 (Ir.) See *Taylor v. Johnston*, 1882.

³ *Hargreave v. Everard*, 1856 (Ir.).

⁴ *Bromley v. Smith*, 1859; *Ld. Portmore v. Taylor*, 1831; *Davies v. D. of Marlborough*, 1818; *Sharp v. Leach*, 1862; *Croft v. Graham*, 1863; *Perfect v. Lane*, 1861; *Benyon v. Fitch*, 1866.

⁵ See cases cited in last note.

⁶ See *Webster v. Cook*, 1867, C. A. (*Ld. Chelmsford, C.*).

⁷ 31 V. c. 4, § 1. See *Miller v. Cook*, 1870; *Tyler v. Yates*, 1871 (*Ld. Hatherley, C.*); *Judd v. Green*, 1876.

⁸ *Ld. Aylesford v. Morris*, 1873 (*Ld. Selborne, C.*); *Beynon v. Cook*,

§ 154. It is a presumption that a tenant for life, or other person having a partial interest in settled estates, who pays off an incumbrance upon them, intends to keep the charge alive as against the inheritance for his own benefit.¹ This presumption, however (on technical rather than on substantial grounds), is inapplicable to a case where a tenant for life pays off the bond debts of the settlor.² Neither does it extend to the case of a charge bearing interest, where,—the rents and profits of the estate having been insufficient to meet the interest,—the tenant for life has paid the balance of it out of his own pocket, without having warned the remainderman of his intention to charge the excess of his payments on the inheritance.³

§ 155. Certain presumptions are also recognised as to *charitable institutions*, and in interpreting charitable grants. Thus, if the charity be founded to support a religious establishment, or to promote religious education, and the intentions of the founder be not clearly expressed, the *prima facie* presumption is, first, that he intended to support an establishment belonging to some particular form of religion, or to promote the teaching of certain particular doctrine; next, that the form of religion or doctrine contemplated was that which he himself had professed; and lastly, if no evidence be adduced of his entertaining particular religious views, that the established religion of the country was the one meant to be supported. If, however, the charity were founded for purposes of mere secular education, or if it were one of a purely eleemosynary character, the court, in the absence of any expressed intention to the contrary, will presume that its benefits are intended to be shared by all persons, whatever their religious opinions.⁴

§ 156. It is also now presumed (contrary to what was once considered to be the law) that an estate for life without impeachment of waste does not confer upon the tenant for life any legal right to commit "*equitable waste*," unless an intention to confer such right expressly appears in the instrument creating the estate.⁵

1875, C. A. See, also, *Nevill v. Snelling*, 1880; *O'Rorke v. Bolingbroke*, 1877, H. L. See, too, *Gen.*, ch. xxv. vv. 29—34.

¹ *Morley v. Morley*, and *Harland v. Morley*, 1855. See post, § 176A.

² *Id.* See *Roddam v. Morley*, 1857.

* *Ld. Kensington v. Bouverie*, 1859, H. L.

⁴ *Att.-Gen. v. Calvert*, 1857 (*Romilly, M. R.*).

⁵ 36 & 37 V. c. 66 ("The Supreme Court of Judicature Act, 1873"), § 25, subs. 3; 40 & 41 V. c. 57, § 28, subs. 3, (*Ir.*).

§ 157. The presumptions, or, rather, the rules of construction recognised in equity with respect to *joint tenancy* are “not very comprehensible.”¹ If two persons jointly advance money *on mortgage*, a mere tenancy in common will be created, though the property be conveyed to them as joint tenants, because the law presumes that men will not willingly speculate with money which they lend.² But, on the other hand, if two persons jointly advance money *as purchasers*, and the sums paid by each be equal, a joint-tenancy will be established, because here it is supposed that men will readily gamble as to survivorship with respect to property which they buy.³ If, however, two persons make a purchase, and one of them advances more of the purchase-money than the other, even though the deed does not contain the words “equally to be divided” there will be no survivorship.³

§ 158. The existence of some mistake in it will not be presumed from the absence from a voluntary settlement of a power of revocation. The circumstance will, however, generally be taken into account, as entitled to weight, in deciding on the validity of the instrument.⁴ Parties relying upon an irrevocable voluntary settlement ought, therefore, to be prepared to prove that the settlor was properly advised when he executed it, that he thoroughly understood the effect of omitting the power, and that he intended to omit it.⁵

§ 159. It is, in the absence of any express stipulation to the contrary, since the 1st of August, 1870, presumed, that “all rents, annuities,”—which term includes salaries and pensions,⁶—“dividends,⁷ and other periodical payments, in the nature of income, whether reserved or made payable under an instrument in writing or otherwise,” accrue from day to day, like interest on money lent, and are apportionable in respect of time accordingly.⁸ The statute

¹ See *Harrison v. Barton*, 1861, and the remarks there of Wood, V.-C.

² *Petty v. Styward*, 1632.

³ *Rigden v. Vallier*, 1751.

⁴ *Hall v. Hall*, 1873, C. A.; *Phillips v. Mullings*, 1874, C. A. See, also, *Welman v. Welman*, 1880.

⁵ *Id.*

⁶ *Treacy v. Corcoran*, 1874 (Ir.); 33 & 34 V. c. 35 (“The Apportionment Act, 1870”), § 5.

⁷ See *In re Griffith, Carr v. Griffith*, 1879 (Jessel, M. R.).

⁸ 33 & 34 V. c. 35, §§ 2, 7. See, also, 4 & 5 W. 4, c. 22 (“The Apportionment Act, 1834”). See *Jones v. Ogle*, 1873, C. A. See, also, *Capron v. Capron*, 1874; *Re Cline's Estate*, 1870; *Pollock v. Pollock*, 1874; *Hasluck v. Pedley*, 1875; *Daly v. Att.-Gen.*, 1870 (Ir.); *Re Cox's Trusts*, 1878 (Hall, V.-C.); *Swansea Bk. v. Thomas*, 1879.

providing this extends to wills, which, though executed before its passing, have come into operation since its date.¹

§ 160. *There exist the following presumptions with respect to the execution, alteration, and revocation of wills:*² — *First*, on proof of the signature of the deceased, he will be presumed to have known and approved of the contents and effect of the instrument he has signed;³ such knowledge and approval being essential to the validity of the will.⁴ This presumption, however, is liable to be rebutted by showing any suspicious circumstances.⁵ Therefore, if the testator, from want of education, or from bodily infirmity, was unable to read,⁶ or if his capacity at the time of executing the instrument is a matter of doubt;⁷ or if the party who is materially benefited by the will has prepared it, or conducted its execution, or has been in a position calculated to exercise undue influence;⁸ or if the instrument itself is not consonant to the testator's natural affections and moral duties;⁹—a more rigid investigation will take place, and probate will generally not be granted, unless the court be satisfied by evidence that the paper propounded really does express the true will of the deceased.¹⁰ In cases of extraordinary suspicion, it will be highly expedient to prove, either that instructions were given by the deceased corresponding with the actual provisions of the will, or that the instrument was, at the time of execution, read to or by

¹ *Constable v. Constable*, 1879 (Fry, J.). The Act applies where a tenant for life dies after its passing, but the testator, under whose will he took, died before that date; *Lawrence v. Lawrence*, 1884 (Pearson, J.).

² For other presumptions respecting wills made prior to 1st Jan., 1838, see the former editions of this Work, §§ 131—134.

³ *Billingham v. Vickers*, 1810; *Fawcett v. Jones*, 1810; *Guardhouse v. Blackburn*, 1866; *Wheeler v. Alderson*, 1831; *Browning v. Budd*, 1848, P. C.

⁴ *Hastilow v. Stobie*, 1865 (Wilde, J. O., overruling a dictum of Cresswell, J. O., in *Middlehurst v. Johnson*, 1861). See *Cleare v. Cleare*, 1869.

⁵ *Von Stentz v. Comyn*, 1848 (Ir.) (Brady, C.).

⁶ *Barton v. Robins*, 1769; *In re*

Duane, 1862; *In re Wray*, 1769 (Ir.); but see *Longchamp v. Fish*, 1807.

⁷ 1 Phillim. R. 193; *Ingram v. Wyatt*, 1828; *Dodge v. Meech*, 1828; *Dufaur v. Croft*, 1840, P. C.

⁸ *Mitchell v. Thomas*, 1847, P. C.; *Scouler v. Plowright*, 1856, P. C.; *Raworth v. Marriott*, 1833; *Greville v. Tylee*, 1851, P. C.; *Paske v. Ollat*, 1815; *Zacharias v. Collis*, 1820; *Wheeler v. Alderson*, 1831; *Billingham v. Vickers*, 1810; *Fulton v. Andrews*, 1875, H. L. (Ld. Cairns, C.); *Durling v. Loveland*, 1839; *Chambers v. Wood*, 1848 (Ld. Cottenham); *Paine v. Hall*, 1812; *O'Connell v. Butler*, 1819 (Ir.); *Gore v. Gahagan*, 1819 (Ir.).

⁹ See *Prinsep and E. India Co. v. Dyce Sombre*, 1832, P. C.

¹⁰ *Browning v. Budd*, 1848, P. C.; *Fulton v. Andrew*, 1875, H. L.

the testator, or that he had expressed some subsequent knowledge and approval of its dispositions; but this precise species of evidence is not absolutely required, and it will be sufficient if, by *any* means of proof, a knowledge and approval of the contents of the will can be brought home to the deceased.¹

§ 161. *Secondly*, where proof can be furnished that, prior to the execution of a will by a competent testator, it was either read over to him, or otherwise brought specially to his notice, the Probate Division will, in the absence of fraud, not only infer, *primâ facie*, that he approved of the contents, but will recognise a *conclusive* presumption to that effect. No matter what evidence may be forthcoming to establish a case of obvious error, or to show that some passage has crept into the instrument by a sheer mistake of the draughtsman, the judge will turn a deaf ear to all such testimony.² Where, however, the jury found as facts, both that a certain word had been introduced into the will by a blunder, and that the clauses in which it appeared had never been brought to the notice of the testator in any way, the court directed that the obnoxious expression should be struck out of the instrument wherever it occurred.³

§ 162. *Thirdly*, in the absence of direct proof, when several sheets of paper, constituting a connected disposal of property, are found together, the last only being duly signed and attested as a will, it will (even in spite of partial inconsistencies in some of the provisions) be presumed that each of the sheets so found formed a part of the will at the time of its execution.⁴

§ 163. *Fourthly*, it is, in favour of attestations to wills, presumed that if a testator *might* have seen them, that he, in fact, *did* see, the witnesses subscribe their names.⁵ The fact of his having been in the same room with them is *primâ facie* evidence of their attesta-

¹ *Barry v. Butlin*, 1838, P. C.; *Mitchell v. Thomas*, 1847, P. C. See further on this subject, 1 Will. on Ex. 97, 311, 312; and *Atter v. Atkinson*, 1869.

² *Guardhouse v. Blackburn*, 1866 (Ld. Penzance); *Harter v. Harter*, 1872 (Sir J. Hannen). Sed qu., for the judicial reasoning in these cases is not so logical as might fairly be

expected. See *In re Oswald*, 1874.

³ *Morrell v. Morrell*, 1882.

⁴ *Marsh v. Marsh*, 1858; *Gregory v. Queen's Proctor*, 1846; *Rees v. Rees*, 1873. See, also, *In re Catrall*, 1863.

⁵ *Todd v. Ld. Winchelsea*, 1826 (Abbott, J.); *Doe v. Manifold*, 1814. See post, § 1054.

tion in his presence, while an attestation not made in the same room is *prima facie* not made in his presence.¹

§ 164. *Fifthly*, in the absence of any evidence to the contrary, the law presumes that all *alterations*, *interlineations*, or *erasures*, which may appear on the face of a will, were made *after* its execution,² and even after the execution of any codicils thereto.³ Consequently the Probate Division of the High Court will, in a case of unexplained alteration, interlineation,⁴ or erasure, only grant probate of the will in its original form.⁵ This presumption, however,—which is contrary to that which prevails with respect to deeds,⁶ resolutions, and other official documents,⁷—may be rebutted by slight affirmative evidence,⁸ such as a statement in the attestation clause that a will had been executed “with a few alterations.”⁹ And it will not apply at all to the *filling up of blanks*. Therefore, where a testator gave instructions that his will should be prepared with blanks for the amount of the legacies, and after his death the will was found regularly executed, with the amounts filled up in his own handwriting, it was, in the absence of all evidence on the subject, presumed that the blanks were filled up before the will was signed, since otherwise the execution would have been a mere idle ceremony.¹⁰

§ 165. *Sixthly*, if a will, traced to the possession of the testator,

¹ *Neil v. Neil*, 1829, 1839 (Am.).

² *Simmonds v. Rudall*, 1850; *Doe v. Catomore*, 1851; *Doe v. Palmer*, 1851; *In re Stone James*, 1858; *Williams v. Ashton*, 1861.

³ *Lushington v. Onslow*, 1848 (Sir H. Fust). See, also, *Christmas v. Whinyates*, 1863.

⁴ *In re White*, 1861. But see *In re Cadge*, 1868.

⁵ *Gann v. Gregory*, 1853 (Stuart, V.-C.); *Cooper v. Bockett*, 1863, P. C.; *Greville v. Tylee*, 1851, P. C.; *In re Hardy*, 1861. A curious instance of this occurred lately. A will was found with pieces of paper stating the amounts of certain legacies pasted over it. These were presumed to have been made since execution, and so not admitted to probate. At that time the original figures, underneath the pieces so pasted on, could not be read, so

they were also not admitted to probate. About twenty years afterwards it was found that these original figures were legible, and the probate was amended by inserting them; *Ffinch v. Combe*, 1894. See Rules for Reg. of Ct. of Prob. in Non-contentious Business, Nos. 8—10.

⁶ *Simmonds v. Rudall*, 1850; *Doe v. Catomore*, 1851.

⁷ *Steevens's Hospital v. Dyas*, 1863 (Ir.).

⁸ See *Dench v. Dench*, 1878; *In re Duffy*, 1871 (Ir.); and *In re Sykes*, 1873; *Moore v. Moore*, 1871 (Ir.). The presumption, moreover, has been altogether set at nought in the case of a will made by an officer in actual military service: *In re Farquharson v. Tweedale*, 1875. *Sed qu.*

⁹ *Doherty v. Dwyer*, 1890 (Ir.).

¹⁰ *Birch v. Birch*, 1848 (Sir H. Fust); *Greville v. Tylee*, 1851.

and last seen in his custody, be not forthcoming on his death, a presumption is made under ordinary circumstances, and unless there be sufficient evidence to rebut it, that such will has been destroyed by the testator, *animo cancellandi*.¹ But the declarations of a testator, whether written or oral, and whether made before or at or after² the execution of the instrument, in such cases furnish cogent proof of his intentions.³ Again, the finding of the will among the testator's papers, with the signature cut out, raises a presumption that the mutilation was effected intentionally by the testator himself; and the will cannot be regarded as revived, though the signature has been again attached by gum to its original place, and the document, when discovered, was in that condition.⁴ In the event, moreover, of a testator having become insane after the will was made, the burthen of proving that it was destroyed by him while of sound mind lies upon the party who sets up the revocation.⁵ The revocation of a will by the testator was at one time considered to raise a *primâ facie*, though by no means a conclusive, presumption that the testator intended to revoke every codicil to it,⁶ but this presumption no longer prevails; and now a codicil (however dependent it may be on the will) can only be revoked in one of the methods prescribed by the Wills Act.⁷

§ 166. With regard to *gifts in wills*, the following presumptions arise. It is, in the absence of any distinct intimation to the contrary, presumed that every testator considers his estate sufficient to answer the purposes to which he has by his will devoted it. Consequently, in the event of any deficiency arising in the assets, all annuities and legacies will, *primâ facie*, be held to abate rateably. In all cases the onus lies upon those who claim any priority to furnish conclusive proof from the language employed, that the

¹ *Sugden v. Ld. St. Leonards*, 1876, C. A.; *Welch v. Phillips*, 1856, P. C. (Parke, B.); *Finch v. Finch*, 1867; *Johnson v. Lyford*, 1868; *Podmore v. Whetton*, 1864; *Dickinson v. Stidolph*, 1861; *Brown v. Brown*, 1858; *In re Brown*, 1858; *Wood v. Wood*, 1867; *Cutto v. Gilbert*, 1854, P. C. (Dr. Lushington).

² *Sugden v. Ld. St. Leonards*, 1876, overruling *Quick v. Quick*, 1864.

³ *Whiteley v. King*, 1854; *Keen v. Keen*, 1873; *Sugden v. Ld. St.*

Leonards, 1876. See also *Saunders v. Saunders*, 1848; *Williams v. Jones*, 1849; *Patten v. Poulton*, 1858; *Eckersley v. Platt*, 1866.

⁴ *Bell v. Fothergill*, 1870.

⁵ *Sprigge v. Sprigge*, 1868.

⁶ *Grimwood v. Cozens*, 1860; *In re Dutton*, 1862; *Medlycott v. Assheton*, 1824; *Clogstown v. Walcot*, 1847. But see *In re Ellice*, 1864; *Black v. Jobling*, 1869.

⁷ *Re Turner*, 1872 (Ld. Penzance).

testator intended the bequests not to stand on an equal footing.¹ Again, it is *primâ facie* presumed that property specifically bequeathed or devised was intended by the testator to pass to the legatee or devisee in its entirety; and this presumption will not be rebutted by a codicil, charging certain pecuniary legacies on *all* the testator's estates, both real and personal.² If, too, an annuity be bequeathed by will for an indefinite period, the law will presume, in the first instance, that it was intended to be given for the life of the annuitant; but this presumption is liable to be rebutted by proof that the testator has used words which indicate an intention that the annuity should be granted, either in perpetuity, or for a fixed number of years.³

§ 167. It is likewise *primâ facie* presumed that a legacy bequeathed to a person, who is also named in the will as an executor, was given to him in that character, and consequently if such person decline to accept the office, he must relinquish the legacy, unless he can show, from the language employed, that the bequest was made to him independently of his character of executor, and solely as a token of personal regard.⁴ When, too, under the terms of a will, the consent of executors or trustees is rendered necessary to the validity of any act, the law presumes, in the absence of any express direction on the subject, that this discretionary power should be exercised by those only who undertake the duties of the office;⁵ and an executor or trustee, who, even without any formal renunciation or disclaimer, declines to accept the office or to act in the trusts, thereby relieves the parties interested from the responsibility of obtaining his consent.⁶ It also is presumed, in the absence of evidence of intention to the contrary, when executors are appointed, and the residuary estate is undisposed of, that the executors are trustees for the next of kin;⁷

¹ *Miller v. Huddleston*, 1851 (Ld. Truro); *Brown v. Brown*, 1836; *Thwaites v. Foreman*, 1844; *Dunboyne v. Brander*, 1854.

² *Conron v. Conron*, 1858, H. L.; *Campbell v. McConaghey*, 1870 (Ir.).

³ *Yates v. Maddan*, 1851; *Lett v. Randall*, 1860; *Stokes v. Heron*, 1845, H. L.; *Potter v. Baker*, 1850; *Blewitt v. Roberts*, 1841; *Hill v. Ratley*, 1862 (Wood, V.-C.); *Sullivan v. Galbraith*, 1870 (Ir.).

⁴ *Stackpole v. Howell*, 1807; In re *Reeve's Trusts*, 1877 (Jessel, M. R.); *Harrison v. Rowley*, 1798; *Reed v. Devaynes*, 1791; *Dix v. Reed*, 1823; *Piggott v. Green*, 1833; *Jewis v. Lawrence*, 1869; In re *Banbury's Trusts*, 1876 (Ir.); In re *Reeve's Trusts*, 1877 (Jessel, M. R.).

⁵ *White v. McDermott*, 1872 (Ir.).

⁶ *Id.*

⁷ 11 G. 4 & 1 W. 4, c. 40.

and that if there be no next of kin (as where the testator is illegitimate), that they may retain the property for their own use instead of its becoming forfeited to the Crown.¹ The presumptions of law with regard to emblements² are somewhat capricious;^{2a} for it is presumed that the personal representatives of a man dying seised in fee of land are entitled to the emblements in preference to the heir, but where there is a devise of the land, that the testator intended them to pass to such devisee.³ This capricious presumption may be rebutted by a specific bequest of the growing crops, or "farming stock,"⁴ to another party; but the title of the devisee to them will not be ousted by a mere disposition of all the testator's personal estate.⁵

§ 168. There is a *prima facie* presumption that the following terms, when used in wills, bear the following meanings:—The word "children" is limited—as it also is when employed in the Statute of Distributions,⁶—to such children as are legitimate according to the law of England; and this presumption will be conclusive, unless there be something in the will itself to show clearly an intention to provide for natural children.⁷ In this last event, such a child, though *en ventre sa mère* at the date of the will, is included in the term.⁸ The word "cousins," in a will, is interpreted to mean "first cousins" only;—first cousins being persons who are cousins german, that is, persons having the same grandparents; while "second cousins" *prima facie* means persons having the same great-grandparents.⁹ Neither "cousins" nor "second cousins" will, in the absence of an evident intention,¹⁰ include the children or grandchildren of first cousins, who are commonly called first cousins once or twice removed.⁹ Again: a testator who uses the word "family" will be presumed, *prima*

¹ In *re Knowles*, 1880 (Malins, V.-C.).

² The old technical term "*emblemence de blet*," for the profits of a growing crop.

^{2a} *West v. Moore*, 1807 (Ld. Ellenborough).

³ *Cooper v. Woolfitt*, 1857.

⁴ *Eyans v. Williamson*, 1881, C. A. (Jessel, M. R.).

⁵ *Cooper v. Woolfitt*, 1857.

⁶ 22 & 23 Car. 2, c. 10, as amended

by "Stat. Law Rev. Act, 1888" (51 V. c. 3); In *re Goodman's Trusts*, 1880.

⁷ *Dorin v. Dorin*, 1875, H. L.; *Ellis v. Houstoun*, 1878; *Boyes v. Bedale*, 1863; *Megson v. Hindle*, 1880, C. A. See *Laker v. Hordern*, 1876.

⁸ *Crook v. Hill*, 1876.

⁹ *Re Parker, Bentham v. Wilson*, 1881, C. A.

¹⁰ *Re Bonner, Tucker v. Good*, 1881.

facie, to mean the children, if any, of the person whose family is spoken of, and there must be a special context to give the word a different meaning.¹ Further, the word "moneys" in a testamentary instrument, will, in the absence of anything in the instrument indicating a different intention,² be confined to ready money actually in hand;³ the word "furniture"—unless under special circumstances⁴—will not include tenant's fixtures;⁵ the term "debentures" will not include "debenture stock";⁶ and the term "unmarried" will, unless otherwise explained by the context, mean "without ever having been married."⁷

§ 169. Another general *prima facie* presumption of law is, that all documents were made on the day they bear date.⁸ This presumption obtains, whether the document be a modern or ancient deed,⁹ a bill of exchange or promissory note,¹⁰ an account,¹¹ or even a letter;¹² and whether it be written by a party to the suit or not.¹³ The rule, however, has been only recognized with reluctance by at least some distinguished judges,¹⁴ and it is, moreover, certainly subject to two exceptions.¹⁵ The first is, where, in order to prove a petitioning creditor's debt, an instrument is put in signed by the bankrupt, which purports to bear date before the act of bankruptcy. The effect of a proceeding in bankruptcy being retrospective,¹⁶ and to invalidate all transactions which have taken place between the act of bankruptcy and the time when the adjudication takes effect, the court feels a reasonable jealousy of a collusion between the petitioning creditor and the bankrupt, and, accordingly, requires that independent proof of the existence of the instrument, previous to the act of bankruptcy, should be given in evidence.¹⁷ The

¹ *Pigg v. Clarke*, 1876 (Jessel, M. R.).

² See *Re Cadogan*, *Cadogan v. Palagi*, 1883.

³ *Langdale v. Whitfield*, 1858 (Wood, V.-C.); *Williams v. Williams*, 1877 (Baggallay, L. J.).

⁴ *Paton v. Sheppard*, 1839.

⁵ *Finney v. Grice*, 1878 (Jessel, M. R.).

⁶ *In re Lane*, 1880.

⁷ *Dalrymple v. Hall*, 1881.

⁸ *Malpas v. Clements*, 1850; *Potez v. Glossop*, 1848; *Morgan v. Whitmore*, 1852.

⁹ *Anderson v. Weston*, 1840; *Davies v. Lowndes*, 1843; *Doe v. Stillwell*, 1838; *Smith v. Battens*, 1834.

¹⁰ 45 & 46 V. c. 61 ("The Bills of Exchange Act, 1882"), § 13; *Anderson v. Weston*, 1840; *Smith v. Battens*, 1834.

¹¹ *Sinclair v. Baggaley*, 1838.

¹² *Potez v. Glossop*, 1848; *Lewis v. Simpson*, 1848, and *Angell v. Worsley*, 1849; *Hunt v. Massey*, 1834; *Goodtitle v. Millburn*, 1837.

¹³ *Potez v. Glossop*, 1848; *Anderson v. Weston*, 1840 (*Bosanquet, J.*).

¹⁴ *Potez v. Glossop*, 1848. See also *Butler v. Mountgarret*, 1859, H. L. (*Ld. Wensleydale*).

¹⁵ See also *Re Adamson*, 1875.

¹⁶ 46 & 47 V. c. 52 ("The Bankruptcy Act, 1883"), § 43.

¹⁷ *Anderson v. Weston*, 1840 (*Bos-*

second exception is, where, in petitions for damages for adultery,¹ letters are put in evidence to show the terms on which the husband and wife were living before the seduction. Here again, to avoid the obvious danger of collusion, some independent proof must be given that the letters were written at the time they bear date.² A *third exception* to the rule in those cases perhaps now exists, where evidence of indorsements made by a deceased obligee on a bond, acknowledging the receipt of interest, is tendered by his assignee, to defeat a plea of the Statute of Limitations, by the obligor.³

§ 170. In applying the presumption that a document was written on the day on which it is dated to bills of exchange, the date of a bill, though *prima facie* evidence of the day when it was drawn, is no proof that it was *accepted* at the same time. The most that the law will presume is that a bill was accepted within a reasonable time after it was drawn, and before its maturity; and it makes that presumption, because in all ordinary transactions such a course of business would be pursued.⁴

§ 171. It is another *prima facie* presumption of law that a person has been duly appointed to it if he has in fact *acted in an official capacity*. For it cannot be supposed that any man would venture to intrude himself into a public situation which he was not authorised to fill. The legislature itself has expressly adopted this presumption in the statutes relating to the excise⁵ and customs.⁶ At common law it applies to lords of the treasury,⁷ masters in chancery, though exercising special powers,⁸ deputy county court judges,⁹ commissioners for taking affidavits,¹⁰ surrogates,¹¹ sheriffs,¹²

anquet, J.); *Sinclair v. Baggaley*, 1838 (Ld. Abinger); *Hoare v. Coryton*, 1812; *Wright v. Lainson*, 1837. These cases overrule *Taylor v. Kinlock*, 1816.

¹ See 20 & 21 V. c. 85, "The Matrimonial Causes Act, 1857," § 33. ² *Trelawney v. Coleman*, 1817; (*Holroyd, J.*); *Houliston v. Smyth*, 1825 (Best, C.J.).

³ See this question discussed, post, §§ 690—696.

⁴ *Roberts v. Bethell*, 1852, questioning *Israel v. Argent*, 1834, and *Blyth v. Archbold*, 1835, cited in *Pears. Chit. Pl.* 330, n. b. See 45 & 46 V. c. 61 ("The Bills of Exchange

Act, 1882"), § 13.

⁵ 53 & 54 V. c. 21 ("The Inland Revenue Regulation Act, 1890"), § 24.

⁶ 39 & 40 V. c. 36 ("The Customs Consolidation Act, 1876"), § 261.

⁷ *R. v. Jones*, 1809 (Ld. Ellenborough).

⁸ *Marshall v. Lamb*, 1843.

⁹ *R. v. Roberts*, 1878, by Ct. of Crim. App.

¹⁰ *R. v. Howard*, 1832 (*Patteson, J.*); *R. v. Newton*, 1844.

¹¹ *R. v. Verelst*, 1813 (Ld. Ellenborough).

¹² *Bunbury v. Matthews*, 1844 (*Parke, B.*).

under-sheriffs,¹ justices of the peace,² constables,³ though appointed by commissioners under a local public Act,⁴ trustees under a turnpike Act,⁵ churchwardens,⁶ overseers,⁷ vestry-clerks,⁸ trustees empowered to raise church-rates under a local Act,⁹ weigh-masters of market towns,¹⁰ attested soldiers engaged in the recruiting service,¹¹ and, indeed, to all public officers.¹² Moreover, no distinction is recognised, though the appointment is one required to be either in writing,¹³ or under seal,¹⁴ or though an action be brought in the name of the officer,¹⁵ or though the title be directly put in issue by the pleading,¹⁶ or though the proceedings be criminal, (as, for instance, a trial for the murder of a constable in the execution of his duty,) and in the highest degree penal.¹⁷ Nor will any exception to the rule be allowed, even where parties are indicted for offences committed by them in their character of public officers. For example, if a person employed by the Post-office be indicted for stealing or embezzling a letter,¹⁸ his formal appointment need not be proved, but it will suffice to show that he has acted in the capacity charged.¹⁹

§ 172. On similar principles the law *primâ facie* presumes the

¹ *Doe v. Brawn*, 1821. See *Plumer v. Brisco*, 1847; *Robinson v. Collingwood*, 1865.

² *Berryman v. Wise*, 1792 (Buller, J.).

³ *Id.*

⁴ *Butler v. Ford*, 1833.

⁵ *Pritchard v. Walker*, 1827.

⁶ *R. v. Mitchell*, 1818 (Abbott, C.J.), cited 2 St. Ev. 307, n. r.

⁷ *Doe v. Barnes*, 1846.

⁸ *M'Gahey v. Alston*, 1836.

⁹ *R. v. Murphy*, 1837 (Coleridge, J.).

¹⁰ *M'Mahon v. Lennard*, 1858, H. L.; *Hayes v. Dexter*, 1861 (Ir.); *M'Mahon v. Ellis*, 1863 (Ir.).

¹¹ *Walton v. Gavin*, 1850.

¹² *M'Gahey v. Alston*, 1836 (Parke, B.); *Marshall v. Lamb*, 1843 (Paterson, J.); *Doe v. Young*, 1845.

¹³ See cases cited in preceding notes to this section.

¹⁴ *Dexter v. Hayes*, 1860 (Ir.) (Fitzgerald, B., explaining *Smith v. Cartwright*, 1851).

¹⁵ *M'Gahey v. Alston*, 1836; *M'Mahon v. Lennard*, 1858, H. L.; *Doe*

v. Barnes, 1846, which was an action of ejectment brought by parish officers: *Cannell v. Curtis*, 1835, where an averment in a declaration that the plaintiff *had been appointed* and was assistant overseer was traversed by the plea. But Tindal, C.J., intimated a strong opinion that it was only necessary for the plaintiff to prove that he *acted* as assistant overseer. This ruling was cited by Parke, B., in 2 M. & W. 209, 1836.

¹⁶ *Hayes v. Dexter*, 1861 (Ir. Ex. Ch.); *M'Mahon v. Lennard*, 1858, H. L.

¹⁷ *R. v. Gordon*, 1789.

¹⁸ See 7 W. 4 & 1 V. c. 36 ("The Post Office (Offences) Act, 1837"), §§ 25, 26.

¹⁹ *Clay's case*, 1784; *R. v. Rees*, 1834 (Parke, B.); *R. v. Barrett*, 1833 (Littledale and Bosanquet, JJ., and Bolland, B.); *R. v. Townsend*, 1841; *R. v. Goodwin*, 1828. In an Irish case, some proof of acting with the sanction of the Post-office authorities was apparently held necessary. *R. v. Trenwyth*, 1841 (Ir.). Sed qu.?

existence of certain relations in life from parties having acted towards each other as occupying those relationships. From such conduct there may be inferred the relations of landlord and tenant, of partnership, and of master and servant,¹ or of master and apprentice, even where no direct proof of the existence of any indenture has been given.² A cogent legal presumption is also raised in favour of the validity of any marriage which is shown to have been celebrated *de facto*,³ and will not be rebutted where a minor is married by licence in her father's lifetime by the mere fact that the mother's name appears in the register as the consenting party, and no evidence is adduced as to the consent of the father;⁴ if persons live together as man and wife, it will, in favour of morality and decency, be presumed that they are legally married,⁵ while this presumption has been carried in Scotland so far that even where the connexion was shown to have commenced in adultery, a subsequent valid marriage has been inferred from strong evidence of habit and repute.⁶ Two exceptions to this last example are, however, recognised in England. Both on an indictment for bigamy,⁷ and on a petition claiming damages against an alleged adulterer,⁸ a valid first marriage⁹ must be proved; and even the proof of a ceremony, which the parties supposed to be sufficient to constitute the relation of husband and wife, is not enough, unless it be shown to be legally valid.¹⁰ These two exceptions rest on the ground, that

¹ *R. v. Fordingbridge*, 1858 (Erle, J.).

² *Id.*; *R. v. St. Marylebone*, 1824.

³ *Piers v. Piers*, 1849, H. L.; *Sichel v. Lambert*, 1864; *Sastry Velaider v. Sembecutty*, 1881, P. C. See *Harrod v. Harrod*, 1854, also ante, § 144.

⁴ *Harrison v. Corp. of Southampton*, 1853.

⁵ *Doe v. Fleming*, 1827; *Goodman v. Goodman*, 1859; *Collins v. Bishop*, 1879 (Malins, V.-C.); *Sastry Velaider v. Sembecutty*, 1881, P. C. The same presumption is recognised by the Mahomedan Law (*Ranee Khujooroonisa v. Mussamut Roushun Jehan*, 1876, P. C.); and by the Roman Dutch Law as prevailing in Ceylon. *Aronegary v. Sambonade*, 1881, P. C.

⁶ The *Breadalbane* case, 1867, H. L.; explaining, or, perhaps, as some may think, *explaining away*, *Cunningham*

v. Cunningham, 1814; and *Lapsley v. Grierson*, 1848, H. L. See also *Lyle v. Ellwood*, 1874; *De Thoren v. Att.-Gen.*, 1875, H. L.; and *Dysart Peer.*, 1881, H. L.

⁷ 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 57. See *R. v. Griffin*, 1879.

⁸ 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), § 33.

⁹ The second marriage need not be such as would be binding in law, if it were not bigamous; e.g., a widower may be convicted of bigamy, if, having a second wife living, he has gone through the ceremony of marriage with a niece of his first wife. *R. v. Allen*, 1872; overruling *R. v. Fanning*, 1865.

¹⁰ *Catherwood v. Caslon*, 1844 (Parke, B.); *Burt v. Burt*, 1860. But see *Rooker v. Rooker* and New-

such proceedings, being of a penal nature, require the strictest proof; and for the exception in cases of adultery, a further reason is, to prevent parties from setting up pretended marriages for evil purposes.¹

§ 173. It is not altogether clear, however, how far the presumption, derivable from *acting* in a particular character, raises a *prima facie* presumption that those who have done so filled the character, which they have assumed, of *corporate bodies*, or of persons suing or being sued as *professional men*, or as filling particular situations. On an indictment, which charged the accused with obtaining the goods of the company by false pretences,² parol evidence that a limited company had acted as such was held sufficient, without strict proof of incorporation; but in this case no allegation of ownership was necessary.³ In an action against a clergyman for non-residence, the plaintiff was held not to be bound to prove the admission, institution, and induction of the defendant, but to have given sufficient *prima facie* evidence by showing that he had received tithes and acted as incumbent.⁴ Plaintiff's appointment as Farrier-General under the Post-horse Act, was, too, presumed from defendant's having accounted to him as such;⁵ and a solicitor, who sued a party for slandering him in his profession, by threatening to strike him off the rolls for misconduct, recovered damages, on proof that he had acted as a solicitor, without showing his due admission and enrolment.⁶ The same lax evidence has several times been allowed in actions by surgeons⁷ and solicitors for their fees, and by parsons for their tithes.⁸ But all these cases, perhaps, rest not so much upon the presumption now under discussion, as on the ground that the opposite party had, by his admissions, either by word or deed, rendered it unnecessary to prove the actual appoint-

ton, 1864 (Wilde, J.O.). See, also, *Patrickson v. Patrickson*, 1865; and cases cited ante in two last notes save one to § 143-4.

¹ *Morris v. Miller*, 1767; *Birt v. Barlow*, 1779 (Ld. Mansfield).

² *R. v. Langton*, 1877, C. A.

³ By 24 & 25 V. c. 96 ("The Larceny Act, 1861").

⁴ *Bevan v. Williams*, 1775, 1776 (Lord Mansfield).

⁵ *Radford v. M'Intosh*, 1790.

⁶ *Berryman v. Wise*, 1791.

⁷ *Gremaire v. Le Clerk Bois Valon*, 1809. See also *Cope v. Rowlands*, 1836. But 21 & 22 V. c. 90, § 32, has rendered it necessary for a *medical man* (and 41 & 42 V. c. 33, § 5 (amended by 49 & 50 V. c. 48, § 26) for a *dentist*), when suing for his charges, to prove his due registration.

⁸ *Radford v. M'Intosh*, 1790; *Berryman v. Wise*, 1791 (Buller, J.). See *Green v. Jackson*, 1865.

ment.¹ Where no such admission has been made, the safer, if not the necessary, course will be to prove the appointment in the ordinary manner; and to do so seems most consistent with modern practice and the latest decisions.

§ 174. As a rule, indeed, it is clear in an action for slander on him in any particular character, the plaintiff must show that he possesses that character.² At all events, where, in an action for defaming him as a physician by using words denying that he held an M.D. degree, the plaintiff, not content with resting his case on evidence of having practised, proceeded to prove that he had received the degree of M.D. from a Scotch University (St. Andrews), the court having held that this did not entitle him to practise in England, he was not allowed to fall back upon proof of practice, on the legality of which he had himself thrown doubt.

§ 175. There are, moreover, three actions, brought by persons who alleged that they held particular offices, where the plaintiffs were respectively nonsuited on failing to prove appointment to the office claimed, although it does not appear that any evidence was offered that they had ever acted in the respective capacities alleged.³ These cases, though for this reason, perhaps, not direct authorities, tend to show what the practice has been, and so far support the view that the rule which renders evidence of acting *primâ facie* proof of due appointment, is confined to cases where the parties occupy a *public* situation, or, perhaps, where the question of appointment is *not directly* in issue.⁴

§ 176. There are also various *primâ facie* presumptions which are founded upon the experience of human conduct *in the ordinary*

¹ See *Smith v. Taylor*, 1805 (Chambre, J.); also judgment of Heath, J.

² *Collins v. Carnegie*, 1834; *Pickford v. Gutch*, 1787 (Buller, J.); and *Smith v. Taylor*, 1805, where possibly the words implied an admission of the character in which the plaintiff sued. In actions of this kind, if the statement of claim alleged that the plaintiff holds a certain office, or belongs to a particular profession or trade, no evidence is now required to support this statement, unless it be distinctly denied in the statement of defence. R. S. C., 1883, Ord. xix.

r. 13.

³ *Sellers v. Till*, 1825; *Savage v. —*, 1780; *Cortis v. Kent Waterworks Co.*, 1827.

⁴ *R. v. Jones*, 1774, where, on an indictment against an apprentice for fraudulent enlistment, it was held that the indenture must be proved, is an authority on neither side of this question, for that decision rested on the ground, that as the *actual and legal* binding was the fact which constituted the gist of the offence, this could only be proved by the best evidence.

course of business. For instance, a mere holding over after the expiration of an old lease, even for a long period (such as ten years), raises no presumption of a new tenancy from year to year;¹ but the receipt of rent raises a legal presumption of a new tenancy from year to year;² though either the payer or the receiver of such rent may repel the presumption, by proving that the payment was made under circumstances inconsistent with it, as, for example, under the impression that the old lease was still subsisting.³ Again, if a tenancy from year to year be created, the law presumes that it was intended to be determinable by either party at the end of the first, as well as of any subsequent, year, unless the parties, when arranging the terms of the contract, have used expressions showing that they contemplated a tenancy for two years at least.⁴ Further, if a lessor, having mortgaged his reversion, is permitted by the mortgagee to continue in the receipt of the rent incident to that reversion, he is during such permission presumptione juris authorised, if it should become necessary, to sue for such rent, or to prevent or recover damages in respect of any trespass or wrong relative to the property, in his own name only.⁵ Whether, under these circumstances, the mortgagor could realise the rent by distress in his own name, is not so clear, but under the old law he could distrain for it in the mortgagee's name, and as his bailiff.⁶ The same implied authority is also recognised in favour of a party, to whom the mortgagor has assigned his equity of redemption.⁷ Again, in actions of trover, the jury will be advised, if not directed, to presume a conversion from unexplained evidence of a demand and refusal.⁸

§ 176A. Whether paying off a mortgage will keep it alive or extinguish it, depends upon the intention of the parties; but, in the absence of any *express* evidence, equity will raise a presumption

¹ Cusack v. Farrell, 1887 (Ir.).

² Bishop v. Howard, 1823; Doe v. Tanriere, 1848; Eccles. Commiss. v. Merril, 1869. In these last two cases the lessors were a corporation.

³ Doe v. Crago, 1848.

⁴ Doe v. Smaridge, 1845. See Brown v. Symons, 1860; Langton v. Carleton, 1873.

⁵ 36 & 37 V. c. 66 ("The Supreme Court of Judicature Act, 1873"),

§ 25, subs. 5; 40 & 41 V. c. 57, s. 28, subs. 5 (Ir.).

⁶ Trent v. Hunt, 1853 (Alderson, B.).

⁷ Snell v. Finch, 1863.

⁸ Caunce v. Spanton, 1844; Stancliffe v. Hardwick, 1835; Thompson v. Trail, 1826; Thompson v. Small, 1845; Davies v. Nicholas, 1836; Clendon v. Dinneford, 1831. See Towne v. Lewis, 1849.

in favour of that intention, which, under the circumstances, would be most advantageous to the party paying. Thus, a mortgage paid off by a tenant for life will, as stated in another place,¹ be presumed to have been intended to be retained for his own benefit against the inheritance; but if the owner of an estate in fee or in tail pays off a charge, a contrary presumption will be recognised, and the mortgage will *primâ facie* be extinguished.²

§ 177. It is also *primâ facie* presumed upon a general hiring of a servant, without any stipulation as to time, that such hiring was for a year, unless, indeed, there are circumstances tending to rebut this presumption,³ as, for instance, an agreement to pay weekly or monthly wages, with no stipulation showing an intention that the service should continue for a longer period than a week or a month.⁴ This rule applies to domestic as well as to farm servants. There is, however, this difference between the two classes, that the service of domestic servants, unlike that of farm servants,⁵ may be determined by a month's warning or on payment of a month's wages.⁶ In the case of clerks, warehousemen, travellers, editors, reporters, actors, ushers, governesses, and the like, the law raises no inflexible presumption of an indefeasible yearly hiring from the mere fact of a hiring for an indefinite period. In all such cases, the jury must determine the question for themselves, after weighing all the circumstances proved, and ascertaining, if possible, what usage prevails in the particular business or employment to which the hiring relates.⁷

§ 177A. There is a presumption that there was a promise that the act should be done within a reasonable time on proof of a promise to marry,⁸ to discharge a cargo,⁹ and in all cases (*e. g.*, a

¹ Ante, § 154.

² *Adams v. Angell*, 1876; *Mohesh Lal v. Mohunt Bawan Das*, 1883, P. C.

³ *Lilley v. Elwin*, 1843.

⁴ *R. v. Worfield*, 1794; *R. v. St. Andrew*, *Pershore*, 1828; *R. v. Pilkington*, 1844; *Baxter v. Nurse*, 1844 (*Coltman, J.*).

⁵ *Beeston v. Collyer*, 1827 (*Gaselee, J.*).

⁶ *Turner v. Mason*, 1845 (*Parke, B.*); *Beeston v. Collyer*, 1827 (*Gase-*

lee, J.); *Fawcett v. Cash*, 1834. Ante, § 34.

⁷ *Baxter v. Nurse*, 1844. See *Holcroft v. Barber*, 1843; *Todd v. Kerrick*, 1852; *Parker v. Ibbetson*, 1858; *Fairman v. Oakford*, 1860.

⁸ *Potter v. Deboos*, 1815 (*Ld. Ellenborough*); *Atchinson v. Baker*, 1797 (*Ld. Kenyon*).

⁹ *Postlethwaite v. Freeland*, 1880, H. L.

contract to deliver goods) in which the time of completion has been left undefined.¹

§ 178.² Moreover, as men are usually vigilant in guarding their property, prompt in asserting their rights, and diligent in claiming and collecting their dues, the law *primâ facie* presumes, where a bill of exchange or an order for the payment of money or the delivery of goods is found in the hands of the drawee, or a promissory note is found in the possession of the maker, that such note has been duly paid,^{2a} or that the goods ordered have been delivered;³ a receipt for the last year's or quarter's rent is evidence of all the rent previously accrued having been paid.^{3a} Further, the mere delivery of money, or of a bank cheque, by one person to another, or the transfer of stock, is, if unexplained, presumptive evidence of the payment of an antecedent debt, and not of a loan;⁴ while payment of money of another, which the drawer admittedly had in his hands, must be presumed on its being shown that a cheque in favour of the plaintiff, who has had it duly cashed, has been drawn on the account of the person who held the money, though it be not proved that the cheque was directly received by the plaintiff from the defendant, and it be urged that it might have passed through many other hands.⁵

§ 179.⁶ Several *primâ facie* presumptions, moreover, are made from the regular course of business in a *public office*. Thus, postmarks on letters, (*when* capable of being deciphered,) are *primâ facie* evidence that the letters were in the post at the time and place therein specified;⁷ "the official mark of any sum on any postal packet as due to the Post-office, British, colonial, or foreign,

¹ *Ellis v. Thompson*, 1838 (Alderson, B.). See *Ford v. Cotesworth*, 1870.

² Gr. Ev. § 38, in part.

^{2a} *Brembridge v. Osborne*, 1816.

³ *Gibbon v. Featherstonhaugh*, 1816; *Egg v. Barnett*, 1800; *Garlock v. Geortner*, 1831 (Am.); *Alvord v. Baker*, 1832 (Am.); *Weidner v. Schweigart*, 1823 (Am.); *Shepherd v. Currie*, 1816.

^{3a} 1 *Gilb. Ev.* 309; *Brewer v. Knapp*, 1823 (Am.); 23 & 24 V. c. 154, § 47.

⁴ *Welch v. Seaborn*, 1816; *Breton*

v. Cope, 1791; *Lloyd v. Sandiland*, 1818; *Cary v. Gerrish*, 1801; *Aubert v. Walsh*, 1812; *Boswell v. Smith*, 1833; *Graham v. Cox*, 1848; *Patton v. Ash*, 1821 (Am.).

⁵ *Mountford v. Harper*, 1847 (Alderson, B.).

⁶ Gr. Ev. § 40, in part.

⁷ *Fletcher v. Braddyll*, 1821; *R. v. Johnson*, 1805; *R. v. Watson*, 1808; *Archangelo v. Thompson*, 1811; *R. v. Plumer*, 1814; *Stocken v. Collin*, 1841; *Butler v. Mountgarret*, 1859, H. L.

in respect of that packet, shall in every part of Her Majesty's dominions be received as evidence of the liability of such packet to the sum so marked ;"¹ and if a letter properly directed² is proved to have been either put into the post-office, or delivered to the postman,³ it is presumed to have reached its destination at the regular time, and to have been received by the person to whom it was addressed.⁴

§ 180. This last presumption, indeed, though generally only *prima facie*,⁵ is in certain cases rendered conclusive, either by rules of court, or by Act of Parliament. Thus, Order LXVII. r. 3 of the R. S. C. of 1883 provides, that "notices sent from any office of the Supreme Court may be sent by post ; and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof, and the posting thereof shall be a sufficient service." Under sect. 142 of the Bankruptcy Act, 1883, "all notices and other documents, for the service of which no special mode is directed, may be sent by prepaid post letter to the last known address of the person to be served therewith,"⁶ and by the Bankruptcy Rules, as to notices of meetings of creditors,⁷—"an affidavit by the trustee, official receiver, or other officer of the court, or the solicitor in the matter, or by the clerk of any such person, that the notice has been duly posted, shall be sufficient evidence of such notice having been duly sent to the person to whom the same was addressed." There are also contained in such rules special provisions,⁸ as to the service of creditors' petitions, and the proof of such service with respect to bankruptcy notices,⁹ and as to serving and proving service of petitions for administering insolvent estates,¹⁰ while the rules further provide¹¹ that, "where notice of an order or other proceeding in court may

¹ 38 & 39 V. c. 22, § 8.

² Where the address was "Mr. Haynes, Bristol," it was held insufficient to raise this presumption: *Walter v. Haynes*, 1824 (Abbot, C.J.).

³ *Skilbeck v. Garbett*, 1845.

⁴ *Saunderson v. Judge*, 1795; *Woodcock v. Houldsworth*, 1846; *Dunlop v. Higgins*, 1848, H. L.; *Household Fire, &c. Ins. Co. v. Grant*, 1879, C. A.; *Bussard v. Levering*, 1821 (Am.); *Lindenberger v.*

Beal, 1821 (Am.); *Warren v. Warren*, 1834; *Kufh v. Weston*, 1799; *Dobree v. Eastwood*, 1827; *Wall's case*, 1872 (Malins, V.-C.); *In re Hickey*, 1875 (Ir.); *Story, Bills*, § 300.

⁵ *Reidpath's case*, 1870 (Ld. Romilly, M.R.).

⁶ 46 & 47 V. c. 52, § 142.

⁷ See rr. 184 and 188.

⁸ See Bankruptcy Rules, 144—8.

⁹ *Id.* r. 123.

¹⁰ *Id.* r. 201.

¹¹ *Id.* r. 82.

be served by post, it shall be sent by *registered* letter.”¹ Again, in Scotland, any summons or warrant of citation, whether of a party or a witness, or warrant of service or judicial intimation, may, in any civil action or proceeding in any court, be executed by posting a *registered* letter duly addressed.² And, under various Acts of Parliament, the service of notices and other documents by post (which is indeed sometimes required to be *registered* post) is permitted. Some of the principal of these Acts are enumerated in the foot-note, but reference must be made to the provisions of the particular statute to see if any given notice or document has been served in the manner required by its provisions.³

¹ See, however, 46 & 47 V. c. 52, § 11, which relates to the service of orders staying proceedings, and is inconsistent with the above rule.

² 45 & 46 V. c. 77, §§ 3 and 4.

³ Some of the principal of the statutes here referred to, arranged alphabetically (no better arrangement suggesting itself), under which notices, &c., may be served by post, are as follow:—“The Agricultural Holdings (England) Act, 1833” (46 & 47 V. c. 61, § 28); “The Alkali, &c. Works Regulation Act, 1881” (44 & 45 V. c. 37, amended 55 & 56 V. c. 30, § 26); “The Army Act, 1881” (44 & 45 V. c. 58, § 163, subs. F.); “The Act of 1851 as to Charitable Institutions (14 & 15 V. c. 56, § 2); “The Companies Act, 1862” (25 & 26 V. c. 89, §§ 62, 63); “The Companies Clauses Act, 1845” (8 & 9 V. c. 16, § 136); “The Conveyancing and Law of Property Act, 1881” (44 & 45 V. c. 41, § 67, subs. 4); “The Copyhold Act, 1894” (57 & 58 V. c. 46, § 57, subs. 1 b); “The Corrupt and Illegal Practices Prevention Act, 1883” (46 & 47 V. c. 51, § 62); “The Act of 1844 as to County Rates (7 & 8 V. c. 33, § 6); “The Dentists Act, 1878” (41 & 42 V. c. 33, § 39); “The Diseases of Animals Act, 1894” (57 & 58 V. c. 57, § 48, subs. 3); “The Ecclesiastical Dilapidations Act, 1871” (34 & 35 V. c. 43, § 69); “The Elementary Education Act, 1870” (33 & 34 V. c. 75, § 81); “The Endowed Schools Act, 1869” (32 & 33 Vict. c. 56, § 57); “The Employers’ Liability Act” (43 & 44 V. c. 42, § 7), on the construction of which see *Moyle v. Jenkins*, 1881;

“The Explosives Act, 1875” (38 & 39 V. c. 17, § 85); “The Factories and Workshops Act, 1878” (41 V. c. 16, § 79); “The Friendly Societies Act, 1875” (38 & 39 V. c. 60, § 30, subs. 11, as amended by 42 V. c. 9); “The Landed Property Improvement (Ireland) Act, 1847” (10 & 11 V. c. 32, § 60); “The Licensing Acts, 1872” (35 & 36 V. c. 94, § 70); “The London County Council” (see 18 & 19 V. c. 120, § 22, and 51 & 52 V. c. 41, § 40, subs. 8); “The Lunacy Act, 1890” (53 V. c. 5, § 327); “The Mines Regulation Acts, 1872” (35 & 36 V. c. 76, § 71, and c. 77, § 40); “The Parliamentary Voters’ Registration Act, 1843” (6 & 7 V. c. 18); “The Patents Designs and Trade-marks Act, 1883” (46 & 47 V. c. 57, § 97); “The Poor Law Amendment Act, 1844” (7 & 8 V. c. 101); “The Public Health Acts, 1875,” for England (38 & 39 V. c. 55, § 267); and for Ireland (41 & 42 V. c. 52, § 267); “The Public Works Loans Act, 1875” (38 & 39 V. c. 89, § 47); “The Regulation of Railways Act, 1873” (36 & 37 V. c. 48, § 35); “The Telegraphs Act, 1878” (41 & 42 V. c. 76, § 12); “The Valuation (Metropolis) Act, 1869” (32 & 33 V. c. 67, § 65); “The Parliamentary Voters’ Registration Act, 1843,” for England (6 & 7 V. c. 18, on construction of which, see *Bishop v. Helps*, 1845; *Hickton v. Antrobus*, 1846; *Bayley v. Overseers of Nantwich*, 1846; *Lewis v. Evans*, 1874; *Hornsby v. Bolton*, 1856; *Hannsford v. Whiteaway*, 1856); and for Ireland, 13 & 14 V. c. 69, §§ 113, 114.

§ 180A. Where by the course of business in a public department a thing has taken place which would not have been allowed to occur without the previous performance of certain formalities, it will be presumed that those formalities have taken place. Thus, on its being shown that the Custom-house would not have allowed goods to be entered without an indorsement on the licence, under which the vessel in which they came was sailing, of the time of her clearance, such an indorsement will be presumed to have been made;¹ and on proof that goods, which cannot be exported without licence, were entered at the Custom-house for exportation, a licence to export them will be presumed.²

§ 181. A similar presumption to that just mentioned is sometimes drawn from the usual course of men's private offices and business, where the primary evidence of the fact is wanting.³ For example, underwriters upon a foreign ship or a foreign voyage are presumed to know the usages and laws of foreign states which affect that ship or that voyage, because such knowledge is necessary for the due conduct of the business;⁴ an underwriter is often presumed, as a matter of fact, though not as one of law,⁵ to know the contents of Lloyd's Shipping List, to which, in the ordinary course of business, he has access;⁶ a man who deals in a particular market will be taken to act according to the custom of that market; a man who, if he directs another to make a contract at a particular place, will be presumed to intend that the contract should be made according to the usage of that place;⁷ so that a person employing a broker on the Stock Exchange impliedly authorises him to act in accordance with the rules there established, provided only that they be reasonable, or, in other words, legal;⁸ and this whether the principal himself be or be not acquainted

¹ *Butler v. Allnutt*, 1816.

² *Van Omeron v. Dowick*, 1809.

³ *Doe v. Turford*, 1832; *Champneys v. Peek*, 1816; *Pritt v. Fairclough*, 1812.

⁴ *Young v. Turing*, 1841 (Ld. Abinger); *Noble v. Kennoway*, 1780 (Ld. Mansfield).

⁵ *Morrison v. The Universal Mar. Ins. Co.*, 1872.

⁶ *Mackintosh v. Marshall*, 1843.

This presumption is strictly confined to cases where the assured has made no representation inconsistent with the list, which is calculated to mislead the underwriter. *Id.*

⁷ *Bayliffe v. Butterworth*, 1847 (Alderson, B.); *Pollock v. Stables*, 1848; *Graves v. Legg*, 1857; *Buckle v. Knoop*, 1867. See post, §§ 1160 et seq.

⁸ See *Pearson v. Scott*, 1878.

with the rules by which such brokers are governed.¹ This latter doctrine, however, will not be carried too far;² and therefore where goods were shipped at Liverpool, and the bill of lading was indorsed to parties residing in New South Wales, evidence of a local usage in Liverpool, affecting the construction of the written contract, was held inadmissible as against the indorsees, in the absence of proof that they were acquainted with the usage.³ Moreover, "Lloyd's" at the Royal Exchange is not a market within the rule, and the usage there prevalent among insurance brokers is not such a general usage as to bind merchants and ship-owners unacquainted with its existence.⁴ Indeed, it is doubtful whether the doctrine applies in its full force to cases of maritime insurance, and authorities⁵ are not wanting which "look the other way."⁶

§ 182. The presumption arising from the usual course of men's private offices and business, again, gives rise, where letters or notices properly directed to a gentleman are left with his servant, to a *prima facie* presumption that they reached his hands;⁷ while the fact of sending a letter to the post-office will in general be regarded by a jury as presumptively proved, if the letter be shown to have been handed to, or left with, the clerk, whose duty it was in the ordinary course of business to carry it to the post, and he declares that, although he has no recollection of the particular letter, he invariably took to the post-office all letters that either were delivered to him, or were deposited in a certain place for that purpose.⁸ But it has been held at *Nisi Prius* that neither proof of

¹ *Sutton v. Tatham*, 1839; recognised in *Bayliffe v. Butterworth*, 1847; *Pollock v. Stables*, 1848; *Bayley v. Wilkins*, 1849; *Taylor v. Stray*, 1857; *Hodgkinson v. Kelly*, 1868; *Coles v. Bristowe*, 1868, C. A.; *Bowring v. Shepherd*, 1870; *Grissell v. Bristowe*, 1868; *Duncan v. Hill*, 1871. See *Nickalls v. Merry*, 1875, H. L.

² See *Robinson v. Mollett*, 1875, H. L.

³ *Kirchner v. Venus*, 1859, P. C. But see *The Steamship Co. Norden v. Dempsey*, 1876.

⁴ *Sweeting v. Pearce*, 1861, Ex. Ch.; *Scott v. Irving*, 1830; *Todd v. Reid*,

1821; *Gabay v. Lloyd*, 1825.

⁵ *Bartlett v. Pentland*, 1830; *Gabay v. Lloyd*, 1825.

⁶ *Bayliffe v. Butterworth*, 1847 (*Ld. Wensleydale*).

⁷ *Macgregor v. Keily*, 1849. This presumption is sometimes conclusive, as, for instance, in the case of a notice to quit served at the tenant's house on one of his servants. *Tanham v. Nicholson*, 1872, H. L.

⁸ *Skilbeck v. Garbett*, 1845; *Hetherington v. Kemp*, 1815; *Trotter v. Maclean*, 1875; *Ward v. Ld. Londesborough*, 1852; *Spencer v. Thompson*, 1856 (*Ir.*). So, in Scotland, "where there is proof of the regular practice

the possession of a letter by a *deceased* person for the purpose of posting, nor of an entry in a postage book made by him in the ordinary course of business, is sufficient legal proof of the postage of a letter.¹

§ 183. The working accuracy of scientific instruments is also presumed. For example, in the absence of evidence to the contrary, a jury would be advised to rely on the correctness of a watch or clock, which had been consulted to fix the time when a certain event happened; a thermometer would be regarded as a sufficiently safe indication of the heat of any liquid in which it had been immersed; a pedometer would afford *prima facie* evidence of the distance between two places which had been traversed by the wearer; and similar *prima facie* credit would be given to aneroids, anemometers, and other scientific instruments; and blood stains are every day detected by means of known chemical tests. Indeed, in some instances this presumption has been recognised by the legislature.²

§ 184. Various presumptions are again recognized in the law of *partnership*. The mere fact of participation in the net profits of a business was, prior to 1860, supposed,³ by an arbitrary and absolute presumption of law, to constitute a partnership. In that year the House of Lords, in the well-known case of *Cox v. Hickman*,⁴ however, denied the existence of any legal presumption to this effect. Consequently, although a right to share in the profits of trade is a strong test of partnership, and, when standing alone, will even justify a jury in presuming its existence, the question whether or not several persons are partners must, nevertheless, in each case depend on the real intention and contract of the parties.⁵ And

of a house of business to despatch its letters in a particular manner to the post-office, it is not necessary to prove that the individual letter in question was so despatched." *Dickson, Ev.* § 6, and cases cited in *n. e.*

¹ *Rowland v. De Vecchi*, 1882 (*Day, J.*).

² Thus, under "The Gas Works Clauses Act, 1871," and the Public Health Acts of 1875 for England, and 1878 for Ireland, the register of a gas or water meter "shall be *prima*

facie evidence of the quantity" of gas or water consumed. See 34 & 35 V. c. 41, § 20; 38 & 39 V. c. 55, § 59; 41 & 42 V. c. 52, § 69, *Ir.*

³ *Waugh v. Carver*, 1793; *Pott v. Eyton*, 1846.

⁴ 1860, H. L.

⁵ *Mollwo, March & Co. v. The Ct. of Wards*, 1872, P. C.; *Ross v. Parkyns*, 1875; *Pooley v. Driver*, 1876; *Ex p. Tennant, Re Howard*, 1877, C. A.; *Ex p. Delhasse, Re Megevand*, 1867, C. A.; *Pawsey v. Armstrong*, 1881.

the Partnership Act, 1865¹ (commonly called Bovill's Act), enables loans of money and contracts for remuneration to be made and annuities to be granted by partnerships without making the recipient a partner. And in partnership law, it is still presumed—in the absence of any contract between partners, or any dealing from which a contract may be implied,—both in England² and in America,³ following the civil law,⁴ that the business has been conducted on terms of an equal partnership; and, consequently, that each partner has a right to insist on an equal participation in profit and loss. It has even been held at Nisi Prius, that, in the absence of all evidence on the subject, partners must be presumed to be interested in equal proportions in the partnership *stock*.⁵

§ 185. Every member in an ordinary *trading* copartnership is moreover presumed to be intrusted with a general authority to enter into contracts on behalf of the firm for the usual purposes of the business, and, consequently, to be empowered to borrow money, and to contract or pay debts, on account of the partnership, and to make, draw, indorse, and accept negotiable securities in the firm's name.⁶ Similar powers, however, are not presumed to exist in the case of mining copartnerships. Accordingly one of several co-adventurers in a mine has no authority, as such, to negotiate any bill on behalf of his fellows,⁷ or to pledge the credit of the general body for money borrowed for the purposes of the concern.⁸ Still less have the members of a firm, not established for trading purposes (as, for example, a firm of solicitors) any implied authority to bind each other by drawing or indorsing bills of exchange, or making promissory notes or even post-dated cheques.⁹ Nor in an

¹ 28 & 29 V. c. 86.

² *Stewart v. Forbes*, 1849 (Lord Cottenham, C., recognising ruling of Lord Eldon in *Peacock v. Peacock*, 1809); *Webster v. Bray*, 1848; *McGregor v. Bainbrigge*, 1848; *Robinson v. Anderson*, 1855; *Collins v. Jackson*, 1862; *Story*, Part. § 24. But see contra, *Peacock v. Peacock*, 1809 (Ld. Ellenborough); and *Tompson v. Williamson*, 1831.

³ *Gould v. Gould*, 1830 (Am.).

⁴ Inst. lib. 3, tit. 26, § 1; Dig. lib. 17, tit. 2, § 29.

⁵ *Farrar v. Beswick*, 1836 (Lord Wensleydale).

⁶ *Jenkins v. Morris*, 1847; *Ex p. Darlington, &c. Bank Co., Re Riches and Marshall's Trust Deed*, 1864; *Story*, Part. §§ 102, 124, 125. Bk. of *Australasia v. Breillat*, 1847, P. C. See *Macclae v. Sutherland*, 1854.

⁷ *Dickinson v. Valpy*, 1829.

⁸ *Ricketts v. Bennett*, 1847; *Burmester v. Norris*, 1851. See *In re German Mining Co.*, 1853; and post, § 1185 ad fin.

⁹ *Torster v. Mackreth*, 1867; *Hedley v. Bainbridge*, 1842.

ordinary partnership has one member of a firm power to bind the others by contracts *out* of the ordinary mode of the partnership dealings, merely because they are reasonable acts towards effecting the partnership purposes.¹ Consequently, where a partner signed a guarantee in the name of the firm for the purpose of giving effect to a transaction within the scope of the partnership dealings, it was, in the absence of proof of any usage, and of any recognition by the other partners, held that the firm was not bound by the guarantee.² Had any evidence been given of the adoption of the act by the other partners, the result would, of course, have been different.³

§ 186. Presumptions are also made in the law of *agency*. Thus, when a seller deals with an agent resident in this country, and acting for a foreign principal, he is presumed not to contract with the foreigner, but to simply trust the party with whom he actually makes the bargain.⁴ This, however, is at best ⁵ a mere presumption of fact, liable to be rebutted by any evidence, whether extrinsic or intrinsic, that credit was intended to be given to the foreign principal.⁶

§ 187. One or two presumptions also attach to particular trades, having been originally founded on principles of public policy.⁷ Thus with regard to *common carriers*. If goods intrusted ⁸ to a common carrier be lost or damaged, the law will conclusively presume that the carrier has been guilty of negligence, unless he can show that the loss or damage was occasioned by "the act of God," or by the Queen's enemies.⁹ Similarly the loss or damage

¹ See *Bishop v. Countess of Jersey*, 1854.

² *Brettell v. Williams*, 1849; overruling *Ex p. Gardom*, 1808. See also *Hasleham v. Young*, 1844; *Duncan v. Lowndes*, 1813. One partner, too, has no implied authority to bind another by submission to arbitration. *Hatton v. Royle*, 1858.

³ *Sandilands v. Marsh*, 1819. See *MacLae v. Sutherland*, 1854.

⁴ *Heald v. Kenworthy*, 1855 (Parke, B.).

⁵ It is put too strongly by Mr. Justice Story in *Story*, Agen. § 290.

⁶ *Green v. Kopke*, 1856; *Mahoney*

v. Kekulé, 1854.

⁷ *Best*, Ev. 528—530.

⁸ The rule does not extend to a passenger's luggage placed in the same carriage with him on a railway; and if such luggage be lost or injured the company will only be liable for the damage on *proof* of the negligence of their servants. *Bergheim v. Gt. East. Ry. Co.*, 1878, C. A.

⁹ *Ross v. Hill*, 1846 (Tindal, C.J.); *Coggs v. Bernard*, 1704 (Ld. Holt). See post, § 1172. The Scotch law on this subject is now embodied in § 17 of 19 & 20 V. c. 60, which enacts, that "all carriers for hire of goods within Scotland shall be liable to

of luggage, while under the custody of a stage-coachman, a cabman, or even a gratuitous bailee, raises a *prima facie* inference of want of care, which, in the absence of evidence to the contrary, renders the bailee liable to an action.¹ Again, with regard to innkeepers. Where chattels not exceeding in value the sum of thirty pounds,² have been lost by a guest³ in a public inn,—which term seems to include an hotel, a tavern, and a coffee-house,⁴—or injured there, the *prima facie* presumption is that the loss or injury was occasioned by the negligence, or, at least, through the defect, of the innkeeper or his servants:⁵ but on proof that it was caused by the negligence of the guest, the landlord's responsibility will cease.⁶ The salaried manager of an hotel belonging to a company, is not regarded as an "innkeeper" within this rule, though the hotel licence may have been granted to himself personally.⁷

§ 188. A presumption of negligence sometimes may be made (if a jury think fit) from the *mere happening of an accident*, if it be one which, in the ordinary course of things, does not happen to those who use proper care in the management of their business, and therefore affords reasonable evidence of negligence, in the absence

make good to the owner of such goods all losses arising from accidental fire, while such goods are in the custody or possession of such carriers."

¹ *Ross v. Hill*, 1846; *Harris v. Costar*, 1825; *Coggs v. Bernard*, 1704. See *Gt. North. Ry. Co. v. Sheppard*, 1852.

² The common law liability of innkeepers has been restricted by 26 & 27 V. c. 41 ("The Innkeepers Liability Act, 1863"), and is now limited to 30*l.*, save as to goods deposited for safe custody, and as to horses and carriages, if the inn has a copy of § 1 of the Act exhibited in a conspicuous part of its hall or entrance. As to the construction of the Act, there is a case of *Moss v. Russell*, 1884, C. A. See, as to this point, *Spice v. Bacon*, 1877, C. A.

³ The depositor must be a guest. See as to what constitutes a guest, *Strauss v. County Hotel Co.*, 1883.

⁴ *Thompson v. Lacy*, 1820; *Turrill v. Crawley*, 1849. § 4 of 26 & 27 V. c. 41 ("The Innkeepers' Liability

Act, 1863"), interprets the word "inn" as meaning "any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests." See *Doe v. Laming*, 1814; and *R. v. Rymer*, 1877. A boarding-house or lodging-house keeper has no duty imposed upon him by law to take care of his lodgers' goods. *Holder v. Soulby*, 1860; *Dansey v. Richardson*, 1854.

⁵ *Dawson v. Chamney*, 1843; *Morgan v. Ravey*, 1861; *Richmond v. Smith*, 1830; *Burgess v. Clements*, 1815; *Armistead v. Wilde*, 1851; *Calye's case*, 1583; *Day v. Bather*, 1863.

⁶ *Armistead v. Wilde*, 1851; *Cashill v. Wright*, 1856; *Morgan v. Ravey*, 1860; *Filipowski v. Merryweather*, 1860; *Oppenheim v. White Lion Hotel Co.*, 1871; *Spice v. Bacon*, 1877, C. A.

⁷ *Dixon v. Birch*, 1872.

of any explanation by the defendant.¹ For example, this has been done where the injury complained of was caused, either by a collision between two railway trains belonging to the same company,² by a railway carriage having, during the journey, unaccountably left the rails,³ or by a barrel of flour falling on a man out of a warehouse window while he was walking in the street below.⁴ On the other hand, where a ladder, inside a private house, from some unexplained cause fell against an upper window and broke it, and the glass in falling damaged the eye of a person passing by, the proof of these facts alone was held insufficient to fix the owner of the house with negligence.⁵ And the mere happening of an accident does not raise a presumption that an injury, which was caused to a person by his acting with rashness to avoid an imaginary danger, that he erroneously supposed had arisen owing to such accident, is attributable to the negligence which originally occasioned such accident.⁶ Indeed, an accident will not be *presumed* to have been attributable to it in all cases where negligence by the defendant is proved. If the facts are equally consistent with its having been caused by some voluntary act of the plaintiffs, a case should only be left to the jury (1) where the circumstances make it a question *of fact* whether such voluntary act of the plaintiff was negligent or not; or (2) where the circumstances are such that an inference that the defendant could, by reasonable care, have avoided the accident would not be unreasonable.⁷

§ 189. Various *primâ facie* and disputable presumptions arise, again, in respect of *infants*. Thus, infants between seven years and fourteen, are *primâ facie* presumed to be unacquainted with guilt, and therefore cannot be convicted, unless the jury shall be satisfied from the evidence, that, when the offence was committed, they had a guilty knowledge that they were doing wrong.⁸ This

¹ Cases cited *infra*, note 5.

² *Skinner v. Lond. & Brighton Ry. Co.*, 1850.

³ *Flannery v. Waterf. & L. Ry. Co.*, 1877 (Ir.).

⁴ *Byrne v. Boodle*, 1863; *Scott v. Lond. Dock Co.*, 1865; *Kearney v. Lond. & Brigh. Ry. Co.*, 1871, Exch. Ch.

⁵ *Higgs v. Maynard*, 1866; *Welfare v. Lond. & Brigh. Ry. Co.*, 1869. See *Moffatt v. Bateman*, 1869.

⁶ *Kearney v. Gt. Southern & Western Ry. Co.*, 1886 (Ir.). Compare *Jones v. Boyce*, 1816; *Davie v. London & S. W. Ry. Co.*, 1883.

⁷ *Coyle v. Great North of Ireland Ry. Co.*, 1887 (Ir.).

⁸ *Russ. C. & M.* 1—5.

rule, though perhaps originally adopted in *favorem vitæ* with respect to capital offences only,¹ has for many years past been expressly held applicable to all felonies.² There seems no reason, on principle, why it should not also be extended to misdemeanors, with the exception, perhaps, of those where an infant occupier of lands, charged with the repair of a bridge or road, might be indicted for non-repair.³ The test of juvenile exemption propounded by Lord Hale, is whether the accused was capable of discerning "between good and evil."⁴ These words are sufficiently indefinite, since they may apply either to legal responsibility or to moral guilt;⁵ and many children of tender years, though perfectly well aware that it is wrong to take what does not belong to them (who are consequently, according to this test, fit subjects for punishment), may yet be only partially acquainted with the sinful nature of theft, and be wholly ignorant that it is a crime against the law of the land.⁶

§ 190. The law also recognises certain presumptions with respect to *married women*. Thus, if a wife commit a felony,⁷ other

¹ 1 Hale, c. 3.

² *R. v. Owen*, 1830.

³ *R. v. Sutton*, 1835.

⁴ 1 Hale, 27.

⁵ See 30 *Law Mag.* 24, and article on McNaughten's trial in *Leg. Obs.* for May 27, 1843, as to the dangerous and unphilosophical nature of this test.

⁶ The loose and unsatisfactory manner in which this merciful presumption of infantile innocence has—at least in former years—been practically rebutted, cannot be more clearly exposed than by referring to a statistical return of juvenile delinquents, published in the present reign. By these it appears that, out of 297 children under the age of fifteen, committed in the metropolis alone during a single year, 238 were actually convicted; and of these no fewer than 36 were sentenced to transportation. See *Porter's Statist. Tables*, Part 14, pp. 149, 151, 152, 153. In 1844, 1596 children, under the age of fifteen, were committed for trial in England and Wales. *Porter's Progress of Nation*, p. 656.

⁷ Some doubt exists as to the crimes excepted from this presump-

tion. "Thus, *Ld. Hale*, in one part of his *Pleas of the Crown*, vol. i., pp. 45, 47, asserts that the presumption is recognised in all cases excepting treason and murder; but in later passages (*id.* 434, 516) he excludes from its operation manslaughter also, and cites as his authority a passage from *Dalton*, in which manslaughter is not mentioned: *Dalt.* c. 104, p. 267; new ed. c. 157, p. 503. *Mr. Serjt. Hawkins* makes the exceptions consist of treason, murder, and robbery (1 *Hawk.* c. 1, p. 4); while *Mr. Justice Blackstone*, in the first vol. of his *Comm.*, mentions only treason and murder (c. 15); and in the 4th vol., c. 2, excepts also crimes that are mala in se, and prohibited by the law of nature, as murder and the like. * * * We would gladly see the exception extended to all capital felonies, if not to all crimes punishable with transportation, and thus abolish a rule of law, which was originally founded on doctrines that no longer prevail, and which every married man knows is often diametrically opposed to the fact": 30 *Law Mag.* pp. 9, 11.

than treason or homicide,¹ or, perhaps, highway robbery,² in company with her husband, the law presumes that she acted under his coercion, and consequently without any guilty intent, unless the fact of non-coercion be distinctly proved. This presumption appears, on some occasions, to have been considered conclusive, and is still *practically* regarded in no very different light, especially when the crime is of a flagrant character.³ The better opinion, however, now seems to be that, in every case, the presumption *may* be rebutted by *positive* proof that the woman acted as a free agent.⁴ Indeed, in one case,⁵ the Irish judges apparently considered that such positive proof was not required, but that the question was always one to be determined by the jury on the evidence submitted to them. However, a married woman cannot, under any circumstances, be convicted as a receiver of stolen goods, when the property has been taken by her husband, and given to her by him.⁶ But she may now be convicted of stealing her husband's goods.⁷

§ 191. It is somewhat doubtful whether this doctrine of coercion extends to any misdemeanors. But the better opinion seems to be, that, if the misdemeanor be of a serious nature, as, for instance, the uttering of base coin,⁸ the wife will be protected in like manner as in cases of felony. The protection does not, however, extend to assaults and batteries,⁹ or to the offence of keeping a brothel.¹⁰ Indeed, it is probable that in all inferior misdemeanors, the presumption,—if admitted at all,—would be held liable to be defeated

¹ See *R. v. Manning*, 1849.

² In *R. v. Stapleton*, 1828 (Ir.), the majority of the judges thought that this presumption does not apply to highway robbery. It certainly does not apply to a case of felonious wounding with intent to disfigure, or to do grievous bodily harm: *R. v. Smith*, 1858. But see *R. v. Torpey*, 1871.

³ 1 Hale, 45; *R. v. Archer*, 1826. See *R. v. Torpey*, 1871.

⁴ See 7 Rep. of Crim. Law Com., p. 21; 30 Law Mag., pp. 9—12; *R. v. Hughes*, 1813; *R. v. Pollard*, 1838 (Tindal, C.J., and Vaughan, J., in a case of arson where the husband was bedridden). See, also, *R. v. Smith*, 1842 (Ir.).

⁵ *R. v. Stapleton*, 1828 (Ir.).

⁶ *R. v. Brooks*, 1853. See *R. v. Wardroper*, 1860.

⁷ See "The Married Women's Property Act, 1882" (45 & 46 V. c. 75), §§ 12, 16, amended by "The Married Women's Property Act, 1884" (47 & 48 V. c. 14); *R. v. Brittleton*, 1884 (Ct. of Crim. App.). Formerly she could not be convicted, even if she had committed adultery and fled with her paramour, taking the goods with her. *R. v. Kenny*, 1877.

⁸ *R. v. Conolly*, 1829 (Bayley, J.); *R. v. Price*, 1837; *Anon.*, 1841 (Ir.).

⁹ *R. v. Cruse*, 1838; *R. v. Ingram*, 1705.

¹⁰ *R. v. Williams*, 1710.

by far less stringent evidence of the wife's active co-operation than would suffice in cases of felony.¹

§ 192. The following *prima facie* presumptions exist with regard to a husband's liability for debts contracted by his wife; where goods are supplied to family or wife, on the order of a man's wife, who is living with him at the time, and the articles are neither excessive in quantity, improvident in quality, nor extravagant in price, it is, in the absence of evidence to the contrary, presumed that the wife was the husband's agent to order such goods.² But this presumption may always be rebutted by proof that the husband, while supplying his wife with an adequate allowance, has expressly forbidden her to pledge his credit even for necessities; and that, too, though the tradesman may have had no knowledge whatever of the husband's prohibition.³ If, indeed, the debt has been incurred by the wife while living separate from her husband, the doctrine of presumptive agency will depend on the cause of separation. Should the wife have been turned out of doors or deserted by the husband, or have left him because his misconduct rendered it impossible for her to remain under his roof,⁴ she has an implied authority to pledge his credit for necessities,⁵ whether supplied to herself or to her infant child,⁶ unless by an adequate⁷ allowance from her husband, or by the terms of her settlement, or perhaps by her own exertions, she be in a position to provide for her maintenance.⁸ On the other hand, a wife who leaves her husband without his consent, and without justifiable cause, has no authority to bind him by her contracts.⁹ Where

¹ *R. v. Cruse*, 1838.

² *Lane v. Ironmonger*, 1844; recognising *Freestone v. Butcher*, 1840 (*Ld. Abinger*); *Atkins v. Curwood*, 1837; *Johnston v. Sumner*, 1858; *Morgan v. Chetwynd*, 1865 (*Cockburn, C.J.*); *Waithman v. Wakefield*, 1807; *Manby v. Scott*, 1660. See *Reneaux v. Teakle*, 1853; *Phillipson v. Hayter*, 1870; *Moylan v. Nolan*, 1864 (*Ir.*); *Reid v. Teakle*, 1853; *Ruddock v. Marsh*, 1857; *Jewsbury v. Newbold*, 1857; and post, §§ 770, 771. See also post, § 842.

³ *Debenham v. Mellon*, 1880, *H. L.*; *Jolly v. Rees*, 1864; *Ryan v. Nolan*, 1864-5 (*Ir.*); *Jetley v. Hill*, 1884

(*Pollock, B.*).

⁴ *Bazeley v. Forder*, 1868 (*Blackburn, J.*).

⁵ *Wilson v. Ford*, 1868. As to how far this doctrine applies to cases where the wife has retained a solicitor to act for her in divorce or other legal proceedings against her husband, see *Ottaway v. Hamilton*, 1878, *C. A.*; *McCredy v. Taylor*, 1873 (*Ir.*); *Shepherd v. Mackoul*, 1813; *Brown v. Ackroyd*, 1856; *Grindell v. Godmond*, 1836.

⁶ *Bazeley v. Forder*, 1868.

⁷ *Baker v. Sampson*, 1863.

⁸ *Johnston v. Sumner*, 1858.

⁹ *Id.*

husband and wife have parted by mutual consent, and the wife has afterwards incurred a debt for articles suitable to her degree, the creditor, to recover from the husband, must affirmatively show either an express authority from him, or at least such circumstances as will justify the jury in implying an authority; for instance, that the wife has been left without adequate means of support, or that an allowance promised to her by the husband has not been paid.¹ Under any circumstances, too, the authority of a wife to pledge her husband's credit is no greater when he is a lunatic than when he is sane.²

§ 193. Moreover, though a wife has often an implied authority from her husband to procure goods on credit, an English court would never, under the old system, presume that she was his agent for the purpose of *borrowing money*; and this even though she were turned out of doors without any misconduct on her part, and without any means of livelihood, and notwithstanding she might have expended the whole of it in procuring the actual necessities of life.³ But a creditor who had been non-suited at common law in pursuance of this doctrine might succeed in equity before a vice-chancellor.⁴ The rules of equity will, in future, prevail on this subject.⁵

§ 194. The rule of law as to proving impotence in matrimonial suits for nullity of marriage is somewhat fantastic. Where the marriage has not been consummated, and no visible defect is proved to exist in either party,⁶ impotence is presumed after, but not before, the expiration of three years of ineffectual cohabitation.⁷ This rule, however, only applies where the impotence is not otherwise proved, but is left to be presumed from continual non-consummation; and the court will never rely on this rule of presumption when other evidence on the subject can be obtained.⁸

§ 195. The presumptions with respect to *parent* and *child* are not

¹ Johnston v. Sumner, 1858; Biffin v. Bignell, 1862; Eastland v. Burchell, 1870. See Manby v. Scott, 1660.

² Richardson v. Dubois, 1869. See Drew v. Nunn, 1879, C. A.

³ Knox v. Bushell, 1857.

⁴ Jenner v. Morris, 1861. See Re Wood's Estate, 1863.

⁵ The old law in Ireland was as it

formerly was in equity in England. Johnson v. Manning, 1860 (Ir.).

⁶ See D., falsely called F. v. F., 1864; B., falsely called B. v. B., 1875 (Ir.).

⁷ M., falsely called H. v. H., 1864; Lewis, falsely called Hayward v. Hayward, 1865, H. L.

⁸ F., falsely called D. v. D., 1865.

very important. If a parent and a child both bear the same Christian and surname, and this name occur in an instrument without any addition of "senior" or "junior," it will be presumed, in the absence of evidence to the contrary, that the parent was intended.¹ For example, if a legacy be left, or a note be made payable, to John Holland, and there be two of that name, father and son, the law, *primâ facie*, presumes that the father is the legatee or payee. This presumption may, however, readily be rebutted, as for instance, in the case of the will, by proving that the testator did not know the father,² or in the case of the note, by showing that the son had had it in his possession, or had indorsed it, or had given instructions to bring an action upon it.³ No presumption of a promise to pay a debt contracted by the child for necessities is made from the mere moral obligation of a parent to maintain his child.⁴

§ 196.⁵ Various *primâ facie* legal presumptions are founded on the *continuance*, or immutability, for a longer or shorter period, of human affairs, which experience tells us usually occurs.⁶ For instance, when the existence of a person, or personal relation, or a state of things, is once proved, the law presumes that the person, relation, or state of things continues to exist till the contrary is shown, or till a different presumption is raised, from the nature of the subject.⁷ For example, where a jury found that a certain custom existed up to 1689, it was held, that, in the absence of all evidence of its abolition, this was in legal effect a verdict finding that the custom still subsisted in 1840;⁸ in settlement cases, unless there be some evidence to the contrary, it will be presumed that a son, though long since arrived at manhood, has continued unemancipated,⁹ and that the settlement of a pauper,¹⁰ or the appointment

¹ *Stebbling v. Spicer*, 1849; *Lepiot v. Browne*, 1703; *Sweeting v. Fowler*, 1815; *Jarmain v. Hooper*, 1843.

² *Lepiot v. Browne*, 1703.

³ *Stebbling v. Spicer*, 1849; *Sweeting v. Fowler*, 1815.

⁴ *Shelton v. Springett*, 1851; recognising *Mortimore v. Wright*, 1840, and overruling *Baker v. Keene*, 1819; *Blackburn v. Mackey*, 1823; *Law v. Wilkin*, 1837. See *Bazeley v. Forder*, 1868.

⁵ Gr. Ev. § 41, as to first seven lines.

⁶ See argument in *Blandy v. De Burgh*, 1848.

⁷ See *Price v. Price*, 1847, overruling *Mercer v. Cheese*, 1842. See, also, *The Gananogue*, 1862.

⁸ *Scales v. Keys*, 1840.

⁹ *R. v. Lilleshall*, 1845, explaining *R. v. Oulton*, 1835.

¹⁰ *R. v. Tanner*, 1795 (*Ashurst, J.*).

of a party to an official situation, continues in force for, at least, a reasonable time;¹ a partnership, agency, tenancy,² or other similar relation, once shown to exist, is presumed to continue, till it is proved to have been dissolved.³ From the presumption of a continuance of a state of things once shown to exist, it follows that when a business is carried on by partners after the expiration of the term limited by the articles, it is *primâ facie* presumed, that such of the provisions of the articles as are not inconsistent with a partnership at will, continue to apply:⁴ if a tenant hold over after the expiration of the term, he impliedly holds subject to all the covenants in the lease which are applicable to his new situation⁵—and this, though the rent has been advanced,⁶ or though the original lessor has assigned his interest to a third party, or, being a clergyman, has resigned his living, and a fresh incumbent has succeeded him;⁷ and that if a man on several occasions authorise his mistress to order goods from a tradesman on his credit, he is liable for articles supplied after the termination of the connexion, unless the tradesman knew of such termination.⁸

§ 197. The continuance of a debt once shown to have existed, is presumed, in the absence of proof of payment, or some other discharge.⁹ It is also presumed, till the contrary appears, that opinions,¹⁰ which individuals once entertained and expressed, and that a state of mind on their part once proved to exist, remain unchanged.¹¹ Every man who has once been sane is presumed to be still of sound mind till the contrary is shown.¹²

¹ *R. v. Budd*, 1805 (Ld. Ellenborough).

² See *Pickett v. Packham*, 1869, C.A.

³ *Clark v. Alexander*, 1844, where a partnership admitted to exist in 1816 was presumed to continue in 1838. See, also, *Alderson v. Clay*, 1816; *Blandy v. De Burgh*, 1848; and *Parsons v. Hayward*, 1862. So, by Hindoo law, a family once joint is presumed to retain that status, unless evidence can be given to show that it has become divided: *Mussamat Cheetha v. Baboo Miheen Lall*, 1867.

⁴ And this, however difficult it may be to say what provisions fall within this description: *Cox v. Willoughby*, 1880 (Fry, J.); *Clark v. Leach*, 1863. See *Woods v. Lamb*, 1866 (*Woods v. -C.*).

⁵ *Torriano v. Young*, 1833; *Thomas v. Packer*, 1857; 23 & 24 Vict. c. 154, § 5, Ir. But see *Oakley v. Monck*, 1865 (Ex. Ch.).

⁶ *Digby v. Atkinson*, 1815 (Ld. Ellenborough), explained in *Johnson v. St. Peter*, Hereford, 1836.

⁷ *Hutton v. Warren*, 1836. See *Thetford v. Tyler*, 1845.

⁸ *Ryan v. Sams*, 1848.

⁹ *Jackson v. Irvin*, 1809 (Ld. Ellenborough).

¹⁰ Gr. Ev. § 42.

¹¹ For instance, all members of a Christian community are presumed to believe the common faith till their acts or declarations evidence the contrary. See *The State v. Stinson*, 1844 (Am.).

¹² *Dyce Sombre v. Troup*, 1856 (*Sir J. Dobson*). In *Sutton v. Sad-*

§ 198. It is on the above principles also a presumption of law that a person shown to have once been living is, by English law, in the absence of proof that he has not been heard of within the last seven years, presumed to be still alive:¹ until a time considerably exceeding the ordinary duration of human life has elapsed. In the civil law the presumption of life ceases at the expiration of one hundred years from the date of the birth,² and the same rule appears to have been adopted in Scotland.³ In England, however, no definite period has been fixed, at the end of which the presumption of a continuance of life ceases. In several old cases, however, the possibility of persons having survived the expiration of terms, periods varying from eighty to ninety-nine years, was neglected in determining the nature of remainders.⁴ In an action of ejectment, where the plaintiff, to prove his title, put in a settlement 130 years old, by which it appeared that the party through whom he claimed had four elder brothers, the jury were allowed to presume, not only that these persons were dead, but, in the absence of all evidence to the contrary, that they had died unmarried and without issue.⁵ And

ler, 1857, this presumption was held to be one of *fact*, which ought not to influence the jury in a case of conflicting evidence. See, also, *Anderson v. Gill*, 1858, H. L. (Ld. Wensleydale); *Crowninshield v. Crowninshield*, 1854 (Am.). And, on the other hand, where any derangement or imbecility is proved or admitted to have existed at any particular period, it is presumed to continue till disproved. See *Att.-Gen. v. Parnter*, 1792; *Grimani v. Draper*, 1848 (Sir H. Fust); *Johnson v. Blane*, 1848 (Sir H. Fust); *Dyce Sombre v. Troup*, 1856 (Sir J. Dodson); *Frinsep and E. I. Co. v. Dyce Sombre*, 1856, P. C.; *Nicholas and Freeman v. Binns*, 1858 (Sir C. Cresswell); *Hassard v. Smith*, 1872 (Ir.); *Blake v. Johnson*, 1819 (Ir.); *Smith v. Tebbitt*, 1867—unless, indeed, it be obviously of a partial or temporary character. See *Walcot v. Alleyn*, 1819 (Ir.); *Leggey v. O'Brien*, 1834 (Ir.); *Airey v. Hill*, 1824; *White v. Wilson*, 1806; *Hall v. Warren*, 1804.

¹ See, however, *R. v. Lumley*, 1869, cited ante, § 114.

² “Vivere etiam usque ad centum

annos quilibet præsumitur, nisi promortuus.” *Corpus Juris Glossatum*, tom. 2, p. 718, n. q; 1 *Masc. de Prob. concl.* 103, n. 5; *Campegius Tract. de Test. reg.* 350.

³ *Morison, Presump.* xvi., *Carstairs v. Stewart*, 1734; *Hubb., Ev. of Suc.* 168. Mr. Dickson in his *Law of Evid. in Scotland*, states, however, that “a precise limit to this presumption has not been fixed.” 1 vol. p. 183. For other foreign laws on the same subject, see *Hubb., Ev. of Suc.* 758, 759.

⁴ *Weale v. Lower*, 1672 (Lord Hale); *Napper v. Sanders*, 1628; *Ld. Derby's case*, 1592.

⁵ *Doe v. Deakin*, 1828; *Doe v. Wolley*, 1828. There *Bayley, J.*, in stating that the jury had properly made this presumption, relied on the general rule, that things must be presumed to remain in the same state in which they were proved to have once been, unless there is some evidence of a subsequent alteration. 3 C. & P. 403. It is, however, submitted that the rule was in this case strained somewhat beyond its legitimate extent. If presumptions are

whenever it becomes necessary to prove the exhaustion of remote branches of a family, the jury may safely be advised to act on very slight evidence, such, for example, as unanswered advertisements or ineffectual inquiries.¹ And in two other cases a book kept by a person has been admitted in evidence, without proof that any inquiries had been made for the writer, or as to his death, in the one case after the lapse of seventy-four years,² and in the other of fifty-four years only.³

§ 199. On the other hand, where a term was for sixty years, the court refused to presume the death of the termor at the expiration of that period, and recognized the possibility of his living after its expiration:⁴ and where a person's deposition had been taken sixty years previously it was held that there was no presumption of his death, and it was refused to admit such deposition in evidence in the absence of any proof of search having been made for the deponent, or any account of him.⁵

§ 200. The presumption of life will, however, certainly on the one hand continue for a period exceeding half a century, unless proof be given either that the party has not been heard of by those persons who would naturally have heard of him had he been alive, or, at least, that search has been ineffectually made to find him.⁶ On the other hand, if evidence be furnished of a person's continuous unexplained absence from home, and of the non-receipt of intelligence concerning him, after the lapse of *seven years*⁷ the presumption of life ceases, and the burthen of proof is devolved on

founded, as they should be, on the experienced course of events, it was surely more probable that one out of four brothers should marry and have children, than that they should all die unmarried. In *Doe v. Griffin*, 1812, where a similar question arose, evidence *negating the marriage* of the party, who was there presumed to have died without issue, was given; and in *Richards v. Richards*, 1731, where the plaintiff claimed as heir by descent, and proved the death of his elder brothers, the court held that he must further show that they died without issue, since in ejectment no

presumption could be admitted against the person in possession. See *In re Webb's Estate*, 1870 (Ir.); *Mullaly v. Walsh*, 1872 (Ir.).

¹ *Greaves v. Greenwood*, 1877, C. A.

² *Jones v. Waller*, 1753. See also *Doe v. Davies*, 1847.

³ *Doe v. Michael*, 1851.

⁴ *Beverley v. Beverley*, 1690; *Doe v. Andrews*, 1850.

⁵ *Benson v. Olive*, 1781; *Manby v. Curtis*, 1815.

⁶ *Doe v. Andrews*, 1850.

⁷ Gr. Ev. § 41, in part.

the party denying the death.¹ Thus, where a person whose life is insured has not been heard of for seven years, those who have effected the insurance are, at the end of that period, entitled to have it paid.² The fixing of this arbitrary period of seven years is explained by its having been inserted in the old statutes concerning leases for lives,³ and since, by analogy, been adopted in other cases.⁴ A period of seven years is also recognized in the various Acts relating to bigamy.⁵ Under the last-named statutes on an indictment, if it appear that the prisoner and his first wife lived apart for seven years before the second marriage, mere proof that the first wife was alive at the latter time will not warrant a conviction, but affirmative evidence that the accused was aware of this fact must be given.⁶ Although, however, a person who has not been heard of for seven years, is presumed *to be dead*, the law raises no presumption as to the *time* of his death; and if any one who seeks to establish the precise period during those seven years, at which such person died, must do so by actual evidence.⁷

¹ Hopewell v. De Pinna, 1809; Rust v. Baker, 1837; Loring v. Steineman, 1846 (Am.). In Bowden v. Henderson, 1854, the presumption of death after seven years' absence was held not to arise, if the probability of the exile sending intelligence home be rebutted by circumstances. See also M'Mahon v. M'Elroy, 1869 (Ir.); Prudential Ass. Co. v. Edmonds, 1877, H. L.

² Willyams v. Scottish Widows' Fund, 1888.

³ 19 Car. 2, c. 6, § 2. See also 6 A. c. 18, entitled "An Act for the more effectual discovery of the death of persons pretended to be alive, to the prejudice of those who claim estates after their death." For the construction and practice under which, see In re Pople, Ex parte Baker, 1889.

⁴ Doe v. Jesson, 1805; Doe v. Deakin, 1821; King v. Paddock, 1820 (Am.). In Scotland the law on this subject is embodied in "The Presumption of Life Limitation (Scotland) Act, 1881" (44 & 45 V. c. 47). See especially § 8. In America it is not necessary that the party be proved to be absent from the United States;

it is sufficient if it appears that he has been absent for seven years from the particular State of his residence, without having been heard of. Newman v. Jenkins, 1830 (Am.); Innis v. Campbell, 1829 (Am.); Spurr v. Trimble, 1818 (Am.); Wambough v. Shenk, 1807 (Am.); Woods v. Woods, 1802 (Am.). In the New York Civ. Code, the presumption is thus briefly expressed:—"That a person not heard from in seven years is dead." § 1780, art. 26. As to cases where the presumption of life conflicts with that of innocence, see § 114, ante. Willyams v. Scottish Widows' Fund, 1888.

⁵ 1 J. 1, c. 11, § 2; 9 G. 4, c. 31, § 22; 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 57.

⁶ R. v. Curwengen, 1865. See R. v. Jones, 1883.

⁷ Connor, In the goods of, 1892 (Ir.); Re Rhodes, Rhodes v. Rhodes, 1887; Re Phene's Trusts, 1869, C. A.; Re Lewes's Trusts, 1871, C. A.; Re Corbishley's Trusts, 1880; Hickman v. Upsall, 1877, C. A.; Lambe v. Orton, 1860; Pennefather v. Pennefather, 1872 (Ir.); Thomas

§ 201. Where, moreover, the facts reasonably raise such an inference, a person's death may be presumed to have taken place *before* a certain date,¹ and death may be presumed after the lapse of a shorter period than seven years—as for instance, if the party, when last heard of, was aged, or infirm, or ill,² or had since been exposed to extraordinary peril, such as a storm and probable shipwreck.³ Although the presumption of the common law, independent of the finding of a jury, does not attach to the mere lapse of time short of seven years.⁴

§ 202.⁵ Closely connected with the subject of the legal presumption as to the continuance of life is that of presumption as to *survivorship*, which may become important with regard to the devolution of property. Common instances, affording occasions for questions of survivorship arising, occur when two persons (especially when two relatives), *perish in the same calamity*, such as a wreck, a battle, or a conflagration. Direct proof can seldom be procured in these cases. In the Roman law, and in several other codes, recourse is had to *artificial* presumptions, whenever the particular circumstances connected with the deaths are wholly unknown, such presumptions being based on the probabilities of survivorship resulting

v. Thomas, 1860; *In re Benham's Trusts*, 1868 (Rolt, L.J.); *In re Peck*, 1860; *In re Nichols*, 1872; *Dunn v. Snowden*, 1863; *Doe v. Nepean*, 1833. *In Nepean v. Doe d. Knight*, 1847 (Ex. Ch.), *Ld. Denman*, in the court's judgment, observes:—"It is true the doctrine will often practically limit the time for bringing the action of ejectment in such cases [*viz.*, where the plaintiff claims as grantee in reversion of an estate]; and circumstances may be supposed, as of a lease for seven years, commencing on the death of A., or of a promissory note payable two months after A.'s death, and many other cases which might be put, in which it would be difficult to carry into effect certain contracts, or to have remedies for the breach of them, if the parties interested, instead of making inquiries respecting the person on whose life so much depended, chose to wait for the legal presumption. Such incon-

veniences may no doubt arise, but they do not warrant us in laying down a rule, that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances." 2 M. & W. 913, 914.

¹ See, for example, *Sillick v. Booth*, 1841; *Ommaney v. Stillwell*, 1856.

² *R. v. Harborne*, 1835 (*Ld. Denman*); *Re Beasley's Trust*, 1869.

³ *Watson v. King*, 1815; *Patterson v. Black*, 1780. In the case of a missing ship, bound from Manilla to London, on which the underwriters had voluntarily paid the amount insured, the death of those on board was presumed by the Prerogative Court, after the absence of only two years, and administration was granted accordingly: *In re Hutton*, 1837.

⁴ See further on this subject, *Hubb. Ev. of Suc.* 167 et seq., 758, 759.

⁵ *Gr. Ev. s.* 29, in part.

from strength, age, and sex. Thus, if a father and son perish together in the same shipwreck or battle, Roman law presumed that the son died first, if he was under the age of puberty; but if he was above that age, that he was the survivor; the principle being, that in the former case, the elder is generally the more robust, and in the latter, the younger.¹ The French code has regard to the ages, and presumes that of those under fifteen the eldest survived; and that of those above sixty, the youngest survived; that if one of the parties were under the age of fifteen, and the other above the age of sixty, the former survived, and that if both parties were between those ages, but of different sexes, the male survived, unless he were more than a year younger than the female: but that if they were of the same sex, the survivorship of the younger must be presumed, as opening the succession in the order of nature.² The same rules were in force in the territory of Orleans, at the time of its cession to the United States, and have since been incorporated into the Code of Louisiana.³ They have also, with some modifications, been adopted into the State of New York.⁴

§ 203. The law of England, however, in such cases recognizes⁵

¹ Dig. lib. 34, tit. 5; De rebus bubius, lib. 9, § 1, 3; Id. i. 16, 22, 23; Menoch. de Præs. lib. 1, Quæst. x. n. 8, 9. This rule, however, was subject to some exceptions for the benefit of mothers, patrons, and beneficiaries.

² Code Civil, §§ 720, 721, 722; Duranton, Cours de Droit Français, tom. 6, pp. 32, 42, 43, 48, 67, 69; Rogron, Code Civil, Expli. 411, 412; Touiller, Droit Civil Français, tom. 4, pp. 70, 72, 73.

³ Civ. Code of Louis. art. 930—933; Dig. of Civ. L. of Orleans, art. 60—63.

⁴ N. Y. Civ. Code, § 1780, tit. 3.

⁵ Alston, In the Goods of, 1892; R. v. Dr. Hay, 1767. The latter case (known as General Stanwix's case) was compromised upon the recommendation of Ld. Mansfield, who said he knew of no legal principle on which he could decide it. See, 1767, 2 Phillim. R. 268, n.; Fearn's Posth.

Works, 38; Doe v. Nepean, 1833 Underwood v. Wing, 1854 (Romilly, M.R.); aff. on appeal (Ld. Cranworth, C., assisted by Wightman, J., and Martin, B.), 1856; Mason v. Mason, 1816. See Durrant v. Friend, 1857; Barnett v. Tugwell, 1862. For the cases decided in the old Eccles. Courts, see Wright v. Netherwood, 1793; more fully reported under the name of Wright v. Sarmuda, 1793; Taylor v. Diplock, 1815; Selwyn's case, 1831; In the Goods of Murray, 1837. In the brief note of Colvin v. Proc. Gen., 1827, where the husband, wife, and infant (if any) perished together, the Court seems to have held that the *prima facie* presumption of law was that the husband survived; but the question was not much discussed; and in Satterthwaite v. Powell, 1838, where a husband and wife perished in the same wreck, the court would not presume that he survived, and consequently refused

no presumption, either of survivorship, or of contemporaneous death;¹ and in the total absence of all evidence respecting the particular circumstances of the calamity, treats the matter as one incapable of being determined.² If indeed, any circumstances connected with the death of either party be proved, the question of survivorship may be dealt with *as one of fact*, and the comparative strength, or skill, or energy, of the two sufferers taken into account.³

§ 204. A *prima facie* presumption in insurance law is that, if a vessel has sailed, and no tidings of her have been received within a reasonable time, she is presumed to have *foundered* at sea.⁴ By "tidings" are meant, not mere rumours, but some actual intelligence received from persons capable of giving an authentic account.⁵ In an action on a policy from an English to a foreign port, the presumption of loss will arise, from proof that the ship was not heard of in this country after she sailed, without calling witnesses from the port of destination to show that she never arrived there.⁶

to grant to his representative the administration of property vested in the wife, the subject of presumed survivorship is fully treated in 4 Burge, Com. on Col. & For. L., 11—29; and in Hubb. Ev. of Suc. 186, et seq., and 759—764. See, also, 2 Kent, Com. 435, 436, 4th ed., n. b.

¹ By the Mahometan law of India, when relatives thus perish together, "it is to be presumed that they all died at the same moment; and the property of each shall pass to his living heirs, without any portion of it vesting in his companions in misfortune." See Baillie's Moohumman Law of Inherit. 172.

² Wing v. Angrave, 1860, H. L.

³ In Sillick v. Booth (1841), Knight-Bruce, V.-C., held that a presumption of priority of death might be raised from the comparative age, strength, and skill of the parties; and accordingly, where two brothers perished by shipwreck, under the circumstances wholly unknown, the one twenty-eight years of age, and the master of the ship, while the other was under age, and acted as second mate, presumed that the elder,

as the stronger and more experienced sailor, survived the younger. This case must, however, be taken not as laying down any rule of law, but as merely a finding of fact, under the particular circumstances.

⁴ Green v. Brown, 1744; Newby v. Reed, 1763; Koster v. Reed, 1826. But in order to recover on a policy, there must be some evidence that when the ship left the port of outfit she was bound upon the voyage insured. Cohen v. Hinkley, 1809 (Ld. Ellenborough); Koster v. Innes. 1825 (Abbott, C.J.).

⁵ Koster v. Reed, 1826 (Bayley, J.), where the statement of a witness that a few days after the vessel sailed he heard that she had foundered, but that the crew were saved, was held not sufficient to rebut the presumption of loss which arose from the ship never having arrived at her port of destination, and not to oblige the plaintiff either to call any of the crew, nor to show that he was unable to do so.

⁶ Twemlow v. Oswin, 1809 (Sir J. Mansfield, C.J.).

Neither English law nor any general custom has fixed any *definite* period after which the assured may demand payment for his loss, in case no intelligence is received respecting the vessel insured; but among insurers a vessel is in practice treated as lost if she be not heard of within six months after departure for any port in Europe, or within twelve months for a greater distance.¹

§ 205. Another presumption in insurance law is that if a ship, shortly after sailing, without visible or adequate cause, becomes leaky, or otherwise incapable of performing the voyage insured, she is deemed to have been unseaworthy at the commencement of the risk.² This, however, is not really a proposition of law, but simply an inference of fact which may be drawn by the intelligence of the jury,³ and it is not so binding that the court will grant a third trial, after the verdict the other way by two special juries.⁴

§ 206. Certain presumptions are again, in maritime cases, made by the Admiralty Division of the High Court, which technically shift the burthen of proof. Thus, if two vessels come into collision, of which one was at anchor,⁵ or “in stays”⁶ at the time, the fact so far raises a presumption in her favour that she is so far *presumed* to be without blame; and the burthen of proof rests on the opposite side to establish, either that the other vessel was to blame or had been improperly put “in stays,” or that the damage was occasioned by stress of weather, or by other unavoidable accident. Again, in the case of a collision between two ships, if the master of either ship fail to render assistance to the other, and to stay by her for that purpose, the collision shall, in the absence of proof to the con-

¹ 1 Park, Ins. 149. By the ordinances of Spain, if a ship insured on going to, or coming from, the Indies, is not heard of within a year and a half after her departure from the port of outfit, she is deemed lost, 2 Magens, 33; by those of France, if the assured receives no news of his ship, he may, at the expiration of a year for common voyages, reckoning from the day of the departure, and after two years for those of a greater distance, make his session to the underwriters, and demand payment, without being

obliged to produce any certificate of the loss. Ordonnance de la Marine, liv. 3, t. 6, des Assur. Art. 58.

² Watson v. Clark, 1813; Munro v. Vandam, 1794 (Ld. Kenyon); Parker v. Potts, 1815, H. L.

³ Pickup v. Thames Ins. Co., 1878, C. A.

⁴ Foster v. Steele, 1837 (Tindal, C.J. and Park, J.; Vaughan and Coltman, JJ., diss.).

⁵ The Bothnia, 1860.

⁶ The Sea Nymph, 1860.

trary, be deemed to have been caused by the wrongful act of the defaulter.¹ Moreover, the infringement of any regulation for preventing collisions at sea,² made under the Merchant Shipping Act,³ 1894, raises a presumption of blame as against the infringer, unless he can show either that circumstances "made a departure from the regulation necessary,"⁴ or that the infringement charged could not by possibility have contributed to the collision.⁵ Again, if a salvor's vessel be injured or lost while engaged in a salvage service, the Admiralty Division presumes, *primâ facie*, that such injury or loss was caused by the necessities of the service, and not by the salvor's default.⁶

§ 207. Another presumption of maritime law, moreover, is in favour of the rights of property in the owners, whenever any question of derelict is mooted between them and the salvors. Therefore, where salvors make a claim, as in a case of dereliction, it will not suffice for them to merely prove that they found the vessel at sea apparently abandoned, but they must go further and prove that the master and crew, when they left the vessel, did so without any hope, expectation, or intention of being able to return, or, in the technical language of the law, *sine spe recuperandi*.⁷

§ 208. Another presumption of Maritime Law is that a ship-owner,—except so far as his liability is limited by the Merchant

¹ The Queen, 1869; 57 & 58 V. c. 60 ("The Merchant Shipping Act, 1894"), § 422.

² Made under Order in Council, gazetted 19th August, 1884.

³ 57 & 58 V. c. 60, § 503 (1, 2).

⁴ 57 & 58 V. c. 60, § 419 (3, 4). These words mean "absolutely necessary," leaving no margin for discretion: *Stoomvaart, &c. v. Pen. & Orien. St. Nav. Co.*, 1880, H. L. But § 17 does not apply to an infringement of the Thames Rules: *The Harton*, 1884.

⁵ *The Magnet*, 1875; *The Englishman*, 1877; *The Tirzah*, 1878; *Emery v. Cichero, Re The Arklow*, 1883.

⁶ *The Thomas Blyth*, 1869.

⁷ *In re Cosmopolitan*, 1848 (Dr. Stock), and cases there cited. The judgment of the court in this case is in accordance with the 33rd article of the laws of Oleron, "if from any ship

or other vessel have been cast over-board several goods or merchandises which are in chests well locked and made fast; or books so well secured and so well conditioned that they may not be damnified by salt water; in such cases it is to be presumed that they who did cast such goods over-board do still retain an intention, hope, and desire of recovering the same: for which reason, such as shall happen to find such things, are obliged to make restitution thereof to him who shall make a due inquiry after them," which has been the law for 750 years and is still in full force and deserves attentive perusal. Independently of dereliction, the Admiralty Division will never decree more than a moiety of the value of the article saved for mere salvage: *Gore v. Bethel*, 1858, P. C.; *The Inca*, 1858.

Shipping Act, 1894,¹—is *prima facie* responsible for any damage occasioned by negligence in the navigation of his vessel. To bring himself within the exemption from liability conferred upon him by the Act where pilotage is compulsory,² a ship-owner must show not merely that he had a pilot on board at the time of the accident, and that the presence of such pilot was compulsory,³ but also that the damage was occasioned exclusively by the pilot's fault.⁴ It will, however, suffice for him in the first instance if he show that the pilot's fault occasioned the damage, leaving his opponent to establish, if he can, a case of contributory negligence against the ship-owner.⁵

§ 208A. It is a further presumption of Maritime Law that the legal owner of a ship is *prima facie* liable to pay for all such repairs and stores ordered by the master,⁶ as are necessary for the equipment and navigation of the ship in the voyage or trade in which she is employed, and that in the absence of all evidence to the contrary,⁷ the master is the agent of the owner to give all

¹ 57 & 58 V. c. 60, §§ 502, 503, and § 633, *infra*; as to the construction of which, see *The Rajah*, 1872.

² § 633 of 57 & 58 V. c. 60 ("The Merchant Shipping Act, 1894,") enacts, that "An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law." See *Conserv. of Riv. Thames v. Hall*, 1868; *Prowse v. The European & Amer. St. Shipping Co.*, 1860; *The Clan Gordon*, 1882. This statutory law is applicable to a case where the collision has occurred within the limits of a foreign port: *The Halley*, 1868, C. A. As to the meaning of the word "compulsory," see *Gen. St. Nav. Co. v. Brit. & Col. St. Nav. Co.*, 1869. As to the meaning of the term "acting in charge," see *The Princeton*, 1878; *The Guy Mannering*, 1882, C. A. A pilot being on board a towed vessel will not exempt the tug from liability: *The Mary*, 1878; *The Sinquasi*, 1880. See, also, *Spaight v. Tedcastle*, 1881, H. L.

³ *The Earl of Auckland*, 1861, P. C.; S. C. nom. *Malcomson v. Baldock*, 1861; *The Hanna*, 1866; *The Annapolis*, 1861; *The Lion*, Owners *v. The York Town*, Owners, 1869.

⁴ *Hammond v. Rogers*, 1850, P. C.; *Pollock v. M'Alpin*, 1851, P. C.; *Bates v. Don Pablo Sora*, 1856, P. C.; *The Carrier Dove*, 1863; *The Iona*, 1867, P. C.; *The Minna*, 1868; *The Valesquez*, 1867, P. C.; *The Victoria*, 1867 (Ir.); *The General De Caen*, 1855; *The Mobile*, 1856; *The Admiral Boxer*, 1857; *The Schwalbe*, 1861, P. C.; *The Netherlands St. Boat Co. v. Styles*, 1854, P. C.; *The Protector*, 1839; *The Diana*, 1840, P. C.; *Rodrigues v. Melhuish*, 1854; *Wood v. Smith*, Re *The City of Cambridge*, 1874; *Clyde Navig. Co. v. Barclay*, 1876, H. L.; *The Meteor*, 1875 (Ir.).

⁵ *Clyde Navig. Co. v. Barclay*, 1876, H. L.; *The Daioz*, 1878; *The Marathon*, 1879.

⁶ As to the authority of a ship's husband to bind the owners, see *Thomas v. Lewis*, 1878.

⁷ *Mitcheson v. Oliver*, 1855; *Hibbs v. Ross*, 1866; *Gunn v. Roberts*, 1874.

needful orders, and has authority to pledge the owner's credit for goods supplied or work done in pursuance of his orders.¹

§ 209. In private International Law, legal presumptions are sometimes made with regard to domicile. Where, for instance, a man either has no fixed place of residence, or has two homes, the scale between which is almost evenly balanced, the presumption is *primâ facie* in favour of what is called the *forum originis*, or *domicil of origin*; by which is meant, not the place where he may chance to have been born, but *the home* of his parents.² Intention to adopt a place as his domicile may be presumed from a person's merely residing or merely marrying in a country—and *à fortiori* from both³ in cases where the domicile of origin is not known;⁴ though any presumption which would otherwise arise from the circumstances last mentioned may be rebutted by showing that the person whose domicile is in question merely came to live in the country for a limited period, or for a special purpose, or that he had no *animus manendi*, or settled intention of making that country his place of permanent abode.⁵ It will also be presumed, where a married man has two houses situate in different countries, in each of which he is in the habit of residing, that his home or domicile is in that house in which his lawful wife and his establishment of servants usually remain when he is at the other.⁶ In consequence of the legal presumption in favour of the domicile of origin,⁷ slighter evidence is required to warrant the conclusion that a man has intended to abandon an acquired domicile, and to resume his domicile

¹ *Frost v. Oliver*, 1853; *Beldon v. Campbell*, 1851; *The Great Eastern*, 1868; *Edwards v. Havell*, 1853. See *Wallace v. Fielden*, 1851, P. C.; *Tronson v. Dent*, 1853, P. C.; *Myers v. Willis*, 1855; *Brodie v. Howard*, 1856; *Hackwood v. Lyall*, 1855; *Mackenzie v. Pooley*, 1856; *Whitwell v. Perrin*, 1858. See *Atlantic Mut. Ins. Co. v. Huth*, 1880.

² *Munro v. Munro*, 1840, H. L.; *Bell v. Kennedy*, 1868, H. L.; *Somerville v. Somerville*, 1801; *Forbes v. Forbes*, 1854; *Cróokenden v. Fuller*, 1859; *Whicker v. Hume*, 1859, H. L.; *Lord v. Colvin*, 1859 (*Kindersley v. V.-C.*); *Hodgson v. De Beauchesne*, 1858, P. C.

³ *In re Eschmann*, *infra*.

⁴ *In re Eschmann*, 1893; *Bempde v. Johnstone*, 1796 (*Ld. Thurlow*); *Bruce v. Bruce*, 1790; *The Diana*, 1803; *The Ocean*, 1804; *The President*, 1804; *Guier v. O'Daniel*, 1806 (*Am.*).

⁵ *Bruce v. Bruce*, 1790; *Bell v. Kennedy*, 1868; *Lord v. Colvin*, 1869; *Jopp v. Wood*, 1865; *King v. Foxwell*, 1876; *Gillis v. Gillis*, 1874 (*Ir.*); *The Harmony*, 1800; *Guier v. O'Daniel*, 1806 (*Am.*).

⁶ *Forbes v. Forbes*, 1854 (*Wood v. V.C.*); *Platt v. Att.-Gen. of New S. Wales*, 1878, P. C.

⁷ See *Udny v. Udny*, 1869, H. L.; *King v. Foxwell*, 1876.

of origin, than is necessary to justify the conclusion that he has determined to abandon this last, and to acquire a new domicile.¹

§ 210. There will, however, be a stronger presumption against the acquisition of a new domicile in the case of a person who is alleged to have gained one in a foreign land, than against the acquisition of one at a place where the party would not be a foreigner.² For instance, a Scotchman would be more readily decided to have acquired an English, or Anglo-Indian, domicile than a French one. This is because a man's acquisition of a foreign domicile is a most serious matter, since it not only renders the validity of his testamentary acts, and the disposition of his personal property, liable to be governed by foreign laws, but is calculated to involve him in a conflict of national duties, and to subject him to the embarrassments of a divided allegiance.³ Further presumptions with regard to domicile are that it is by law presumed that the domicile of a wife is the domicile of her husband. Although, however, this presumption is, as a general rule, conclusive,⁴ an exception might possibly be recognized in the case of a judicial separation pronounced by competent authority,⁵ or where the husband had abjured the realm, deserted his wife, and established himself permanently in a foreign country, or had committed felony, and been transported.⁶

§ 211. It is a presumption of law with regard to copyhold property which is made in the absence of proof of any specific custom in the manor, first, that estates tail cannot be created, and next, that if they can, they are liable to be barred either by a common surrender, or by a surrender to the use of a will.⁷

§ 212. It is a *prima facie* presumption of law with regard to peerages that where the limitation of a peerage cannot be discovered, it descends, not to the heirs general, but to the heirs male of the body of the original grantee.⁸

¹ *Lord v. Colvin*, 1859 (Kindersley, V.-C.); *Douglas v. Douglas*, 1871 (Wickens, V.-C.).

² *Id.*; *Whicker v. Hume*, 1858, H. L. (Ld. Cranworth); *Hodgson v. De Beauchesne*, 1858, P. C.; *Crookenden v. Fuller*, 1859.

³ *Id.*

⁴ *Dolphin v. Robins*, 1859, H. L.

⁵ *Id.* (Ld. Cranworth, Ld. Kingsdown).

⁶ *Id.* (Ld. Cranworth).

⁷ *Gould v. White*, 1854; *Radford v. Wilson*, 1754; *Moore v. Moore*, 1755.

⁸ *Glencairn Peer.*, 1796, H. L.; re-

§ 213.¹ It is a presumption arising from the spirit of comity which is presumed to exist among nations, and a maxim of international law, that when the solution of any legal question depends upon the laws of a foreign state,—as, for example, when a contract made in one country is sought to be enforced in another,—courts of justice must, in the absence of any positive rule affirming or denying or restraining the operation of such foreign laws, presume that such foreign laws have been adopted by their own government, unless, indeed, they are repugnant to its policy, or prejudicial to its interest.²

§ 213 A. The above appear to be some of the examples of presumptions of law which are most frequently met with.

§ 214.³ PRESUMPTIONS OF FACT, it was pointed out, at the commencement of this chapter,⁴ are the second of the two branches into which all presumptive evidence may be divided. Such presumptions are, in truth, mere arguments, of which the major premiss is not a rule of law; they belong equally to any and every subject-matter; and are to be judged by the common and received tests of the truth of propositions, and the validity of arguments. They depend upon their own natural efficacy in generating belief, as derived from those connexions, which are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect, that while presumptions of law are reduced to fixed rules, and constitute a branch of the system of jurisprudence, presumptions of fact are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law. Such, for example, is the inference of guilt, drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which, by means of such an instrument, had been burglariously entered.⁵

cognized and confirmed in *Montrose Peer.*, 1853, H. L.; *Herries' Peer.*, 1858, H. L.; *Breadalbane Peer.*, 1858, H. L.

¹ Gr. Ev. § 43, in part.

² *Bk. of Augusta v. Earle*, 1839 (Am.); Story, Conf. §§ 36—38;

Huber, de Conf. Leg., lib. 1, tit. 2, § 2, p. 538.

³ Gr. Ev. § 44, almost verbatim, except the note.

⁴ *Supra*, § 70.

⁵ In *Henry VI.*, Pt. ii., Act iii., Sc. 2, Warwick, after contemplating

§ 215. These presumptions of fact remain the same under whatever law the legal effect of the facts, when found, is to be decided.¹ They embrace all the relations between the fact requiring proof and the fact or facts actually proved, whether such relations be direct or indirect, and whether they be physical or moral. A single circumstance may raise the inference, as well as a long chain of circumstances. For instance, the decision of King Solomon as to which of the two harlots was the mother of the living child, rested on the general presumption² in favour of maternal affection,³ while the famous judgment of Sancho Panza acquitting the herdsman charged with rape,⁴ was founded on the ascertained fact that the prosecutrix successfully resisted the attempt to take her purse, which the accused made by order of the court.

§ 216.⁵ Although it is the exclusive province of the jury to fix the due weight which ought to be given to presumptions of fact, juries are usually aided in their labours by the advice and instruction of the judge, more or less strongly urged, at his discretion. Indeed, some few general propositions in regard to matters of fact, and the weight of testimony, are now universally taken for granted in the administration of justice, and are sanctioned by the usage of the bench.⁶ Such, for instance, is the caution usually given to juries, to regard with distrust the testimony of an accomplice,

“duke Humphrey’s timeless death,”
comments thus:—

“Who finds the heifer dead, and
bleeding fresh,
And sees fast by a butcher with
an axe,
But will suspect ’twas he that
made the slaughter?”

See, also, Smollett’s “Adventures of Roderick Random,” Ch. xx.

¹ See 3 St. Ev. 932; 6 Law Mag. 370. This subject has been successfully illustrated in Wills, Cir. Ev. *passim*.

² Apart from this presumption, the sacred narrative contains not one word to show that, after all, the judgment was really in accordance with the fact.

³ 1 Kings, ch. 3, vv. 16—28. Suetonius, in his life of the Emperor Claudian, ch. 15, states that that monarch discovered a woman to be the real mother of a young man,

whom she refused to acknowledge, by commanding her to marry him; for rather than commit incest she confessed the truth. Diodorus Siculus also speaks of a King of Thrace, who discovered which of three claimants was the son of a deceased king of the Cimmerians, by ordering each of them to shoot an arrow into the dead body. Two obeyed without hesitation, but the other refused. See Bagster’s Comprehensive Bible, note B. to v. 25 of ch. 3 of 1 Kings.

⁴ “Sister of mine,” said honest Sancho, to the damsel, “had you shown the same, or but half as much courage and resolution in defending your chastity, as you have shown in defending your money, the strength of Hercules could not have violated you.” Don Quixote, part 2, book 3, ch. 13.

⁵ Gr. Ev. § 45, in part.

⁶ See New York Civ. Code, § 1852.

unless it be materially confirmed by other evidence, for though there is no rigid presumption of the common law against such testimony, experience has shown that it is little worthy of credit: and on this experience the usage is founded.¹ Other cases in which, though there is no actual rule of law on the subject, similar cautions should be given, are with regard to the *verbal admissions* of a party, (this kind of evidence being subject to much imperfection and mistake²), or to the effect that little reliance can be placed on the remainder of the evidence of a witness who has been detected in telling a falsehood in one part of his testimony.

¹ See further as to the corroboration of accomplices, post, §§ 967—971.

² Oxford Spring Circuit, 1833, 5

C. & P. 542, n. (Parke, J.); *R. v. Simons*, 1834 (Alderson, B.); *Williams v. Williams*, 1798. See post, §§ 861, 862.

AMERICAN NOTES.

Conclusive presumptions. — The phrase “conclusive presumption” is a contradiction in terms. There is and, indeed, in the nature of things, can be, no such thing. The expression, while possibly sufficient or at least innocuous for the purposes of particular cases in which it has been used, has brought into the law of presumptions an almost impenetrable mass of ambiguity. A presumption is an inference of the existence of one thing from proof of another. It is a creature of logic; — a syllogism where the major premise is the known connection which human experience establishes between the fact proved and the fact to be proved. A dry remark of Chief Justice Chapman (*Atwood v. Scott*, 99 Mass. 177 (1868)) illustrates this. “Experience is not sufficiently uniform to raise a presumption that one who has the means of paying a debt, will actually pay it. Accordingly, it is held that the fact that a debtor has had such means is not evidence tending to show that the debt has been paid.”

In all cases where evidence is not direct, it produces conviction in the mind of the tribunal in this way. Where evidence is not directed immediately to the fact in issue but to facts which tend to render probable (or improbable) the existence of the fact in issue, *i. e.*, when facts relevant to the issue are the subject of evidence, the probative force of those mediate facts consists entirely in this; — that they “raise a presumption” of the existence of the fact in issue. Strictly speaking, therefore, all presumptions are of fact. Jurisprudence may intervene, for various reasons, and with various effects, to *assume* that certain of the stronger presumptions of fact are sufficient to establish a *prima facie* case, in the absence of evidence to the contrary. It is convenient to call these latter, “presumptions of law.” But such a course is confusing if it leads to any obscuring of the fact that a “presumption” is, as has been stated, merely the logical inference of the existence of the unknown from proof of the known.

The confusion so created is increased if not only the “assumptions” of jurisprudence but the rules of positive, even, at times, of statutory, law are classed among presumptions — “conclusive presumptions,” as the phrase is. When it is said that we “presume” a certain fact exists because we know that another fact, with which it usually co-exists, is in existence, it is of the very essence of the expression that it is permissible to show that the inference is erroneous; — either (1) Because the major premise of common experience, to which reference is impliedly made, is fallacious, or (2) Because the minor premise, that the case in hand comes within the rule, is itself untrue. If, for example, it be claimed that, as a matter of

experience, men not heard from for seven years by those who would be most apt to hear from them are dead, and that since A. has not been heard from by such persons within that period he is presumably dead; — we have a case of presumptive reasoning. Without taking into consideration any weight which judges have seen fit to give, as a rule of law, to the probative force of this presumption, we have, in any case where the death of A. is in issue, or relevant to the issue, established an inference or presumption of his death. But it must necessarily be open to the opposite interest to contend and offer evidence to show either (1) That men not so heard from are not usually dead; (2) that A. has been heard from; — in other words that one or the other premise of the syllogism is false. If the instance is a fair one, it follows that all presumptions are rebuttable; — from the meaning of words.

What, then, are conclusive presumptions of law? They will, it is thought, be found to have no direct relation whatever to the law of evidence. They are almost uniformly rules of substantive law expressed as a rule of evidence. Like other rules of positive law, they determine what facts may be proved in any particular issue, and as evidence is only directed to the existence of facts in issue, the rules of substantive law which masquerade as so-called “conclusive presumptions,” affect the law of evidence merely by determining what issues can be raised. But to extend the law of evidence so as to embrace decisions as to what issues may be raised would obviously be to transfer a large part of the entire *corpus juris* into this branch of the law. What facts may be placed in issue in a given matter is a question to be settled by substantive law. Which of these facts are placed in issue in a given case is a question of pleading. What may be shown, assuming a fact to have been placed in issue, in order to prove (or disprove) its existence, is a question of evidence.

Yet judges only too frequently rule that “evidence is not admissible to prove” a certain fact when what they really mean, or should mean, is that the fact itself is not admissible, because, as a matter of positive law, or under the pleadings, the fact itself is not in issue or relevant to any fact that is in issue. In any case where the fact itself is admissible, very frequently the evidence offered and properly rejected would be entirely competent.

In much the same way, judges have said that a fact is “conclusively presumed,” to exist when, in truth, the rules of positive law forbid its existence being placed in issue and have therefore made it impossible to introduce any evidence on the subject. This has usually been done for two main reasons: (1) From the confusion of expression above referred to; (2) From a desire to conceal the fact of judicial legislation.

(1) **False presumptions.** STATUTE OF LIMITATIONS. — It is said,

for example, that unless a cause of action accrued within a certain time prior to bringing proceedings to enforce it, it will be "conclusively presumed," that the cause of action has been paid or otherwise settled. This is spoken of as part of the law of evidence. But where the statute of limitations is relied on to defeat a cause of action it is perfectly clear that the issue is not one of payment;—where the defendant supports a plea of payment by setting up a conclusive presumption of payment under the statute. The statute itself must be pleaded and relied on, and the only issue is whether the facts necessary to this statutory bar really exist. Did the cause of action accrue within the statutory period? If it did not, has the statutory bar been waived or defeated? These are the only points on which evidence is admissible, because they alone can be in issue. The fact of payment of the cause of action is not in issue. It is of no consequence. The phrase that it is "conclusively presumed" to exist is merely a misleading way of saying so. With the intention of the legislature, or the grounds of public expediency on which the legislature proceeded, the law of evidence is not concerned, except in the matter of construction.

IGNORANCE OF LAW.—Another instance of the fact that "conclusive presumptions" are paraphrases of some rule of positive law is furnished by the learned author in § 80, *supra*. The statement is that "courts conclusively presume that which in a vast number of cases must of course be contrary to the fact . . . that every sane person, above the age of fourteen, is acquainted with the criminal as well as the civil, the common as well as the statute, law of the land."

It may well be doubted, we may notice, in passing, whether any authority whatever can be cited for this proposition. The English authorities seem to be opposed to such a rule.

"There is no presumption in this country," says Mr. Justice Maule, "that every person knows the law; it would be contrary to common sense and reason, if it were so." *Martindale v. Falkner*, 2 C. B. 706, 719 (1846). So Lord Mansfield, in *Jones v. Randall*, 1 Cowper, 37 (1774), said, speaking of the contention that all the judges knew the laws, "as to the certainty of the law mentioned . . . it would be very hard upon the profession, if the law was so certain that everybody knew it; the misfortune is that it is so uncertain, that it costs much money to know what it is, even in the last resort."

What is meant by this conclusive presumption apparently is that, as a matter of substantive law, knowledge of the law is immaterial on the question of its observance. It is not and cannot, with safety to society, ever be a defence to a claim of legal liability that the party said to be liable did not know of his liability. No issue, therefore, can be raised on the question of such knowledge. There-

fore no evidence can be submitted as to it. The equivalent phrase, "Ignorance of the law excuses no one," correctly states the rule as one of positive law. Such a form of statement is not open to the objection of attempting to incorporate into the law of evidence something with which evidence has no concern; — by saying that a fact, the existence of which is immaterial, is "conclusively presumed" to exist. That the latter is the correct statement of the rule is amply established by authority.

"No system of criminal jurisprudence can be sustained on any other principle" than that "ignorance of the law excuses no one." *U. S. v. Antony*, 11 Blatch. 200 (1873); "No man can avoid a liability, as a general thing, because he is ignorant of the law. This is an essential rule of society." *Black v. Ward*, 27 Mich. 191 (1873).

"The rule is that ignorance of the law shall not excuse a man or relieve him from the consequences of a crime, or from liability upon a contract." *Martindale v. Falkner*, 2 C. B. 709, 720 (1846); "As he is bound to know the law, he is held to the consequences of a wilful violation of it, whether he knew of its existence or not. Otherwise it would be difficult to punish any man for a violation of law, because it might be impossible to prove that he had knowledge of the law. Hence the legal presumption is that every man knows the law and that his violations of it are wilful." *Whitton v. State*, 37 Miss. 379 (1859); "If a man knowingly does acts which are unlawful the presumption of law is that the *mens rea* exists; ignorance of the law will not excuse him." *R. v. Mailloux*, 3 Pugsley, 493, 515 (1876); "It is a rule of presumption, adopted from necessity, and to avoid an evil which would otherwise constantly perplex the courts in the administration of the criminal law; that is, the plea of ignorance. Hence the maxim 'that ignorance of the law excuses no one.' The courts and the profession, however, well know that this necessary rule of presumption, as often, and perhaps oftener than otherwise, presumes against the truth." *Brent v. State*, 43 Ala. 297 (1869).

That the so-called conclusive presumption of knowledge of the law is in truth not a presumption is demonstrated when knowledge of the law becomes a fact in issue or relevant thereto and when therefore it is to be established by affirmative evidence. Under these circumstances the so-called "presumption" of knowledge is found to have no probative force whatever. For example, where a question arose whether a wager as to the existence of a rule of law was upon a *certain* event; held, it was not. *Jones v. Randall*, 1 Cowper, 37 (1774). Where the question was whether a client knew enough law to understand when and in what courts the services charged by an attorney were rendered, the court say, "The question is, whether this bill conveys information enough to a person as igno-

rant of the law as he may with propriety be. I think that the client is not to be presumed to know that the business was done in Chancery, because of the mention of warrants, interrogatories, decrees, and the like. . . . Afterwards there comes a charge for 'perusing decrees and reports at the Report-office' which it is said the client must know could only be in Chancery. I do not agree that the client is to be presumed to know anything of the kind." *Martindale v. Falkner*, 2 C. B. 709 (1846). Where, by statute, all votes cast at a certain election for a candidate were, if the latter was known to be ineligible to election, thrown away; and an election was held at which votes were cast for A., who was by a plain provision of law ineligible to the office in question, it was decided that there was no such presumption that the voters knew the law as to prove that, as a matter of fact, they did know it and, by consequence, that such votes would be thrown away. "It does not seem to me consistent with either justice or common sense or common law, to say that because these voters were aware of a certain circumstance, they were necessarily aware of the disqualification arising from that circumstance. . . . A maxim has been cited, which, it has been urged, imputes to every person a knowledge of the law. The maxim is *ignorantia legis neminem excusat*, but there is no maxim that says that, for all intents and purposes, a person must be taken to know the legal consequences of his acts." *Queen v. Mayor of Tewksbury*, L. R. 3 Q. B. 629 (1868).

In a case where a promissory note payable in Canada was made payable in "Canada currency" and this was construed to mean payment in gold, the contention was made that as the parties must be presumed to know that, by the law of Canada, the note would have been payable in gold without express stipulation, some other meaning must have been intended, the court say, "The maxim referred to in regard to a knowledge of law is misapplied. No man can avoid a liability, as a general thing, because he is ignorant of the law. This is an essential rule of society. But the law is not so senseless as to make absurd presumptions of fact." *Black v. Ward*, 27 Mich. 191 (1873). Negligence is not imputable to an attorney because he followed a widely accepted but erroneous construction of the law. *Mash v. Whitmore*, 21 Wall. 178 (1874); *Morrill v. Graham*, 27 Tex. 646 (1864).

The real nature of this "conclusive presumption" is further shown by the limitations which have been placed on it. "It must be confined to presuming that all persons know the law exists, but not that they are presumed to know how the courts will construe it, or whether, if it be a statute, it will, or will not, be held to be constitutional." *Brent v. State*, 43 Ala. 297 (1869); "Where the act done is *malum in se*, or where the law which has been infringed is settled and plain, the maxim in its rigour will be applied; but

where the law is not settled, or is obscure, and where the guilty intention, being a necessary constituent of the particular offence, is dependent on a knowledge of the law, this rule, if enforced, would be misapplied." Cutter *ads. State*, 36 N. J. Law, 125 (1873). So where trustees acted in good faith and under the advice of counsel, but in an erroneous view of the law, the supreme court of Ohio say: — "Would it be just under such circumstances to hold them accountable for their ignorance of this recondite, and I might even say, doubtful principle of law? . . . A majority of the court think not." Miller *v. Proctor*, 20 Oh. St. 442 (1870). "The familiar maxim that ignorance of the law is no excuse for the breach or non-performance of any agreement, because any one is presumed to know the law, applies only to general public laws, which prescribe a rule of action to the entire community: . . . It has no application whatever to special or private laws. . . . All the authorities concur, that ignorance of foreign law is deemed to be ignorance of *fact*; because no one is presumed to know the foreign law . . . The laws of the other states of the Union are to be regarded as foreign laws." King *v. Doolittle*, 1 Head (Tenn.), 77 (1858).

CONCLUSIVE PRESUMPTION OF INTENT. — So the learned author, relying on 1 Greenleaf, Evid. § 18, affirms that "a sane man of the age of discretion is conclusively presumed to contemplate the natural and probable consequences of his own acts." If by this is meant, as a matter of positive law, that if A. has done an illegal act, he cannot set up in defence that he did not mean to do it, the statement is correct. In this view, it closely resembles the so-called "conclusive presumption that every one knows the law."

But if the statement is intended to assert a rule of evidence, it is not only erroneous, but fairly open to the criticism which the supreme court of Indiana (Clem *v. State*, 31 Ind. 480, 484 (1869), in a well-considered opinion, make on the statement as it appears in the learned work of Prof. Greenleaf. "It is not sustained by the authorities which the author cites in its support. It is entirely at variance with principles which have received the uniform sanction of all the courts in this country and Great Britain. It is a great inaccuracy, and it is strange that a work which has passed through so many editions should still contain it. A conclusive presumption admits of no proof to rebut it; and murder is a felonious killing. . . . The purport of it, then, is, that if the defendant killed the person named by the deliberate use of a deadly weapon, no evidence to show that the act was done in his necessary self-defence can be sufficient to rebut the presumption, or to prove that the killing was excusable and not felonious." The courts of Kansas refuse even to allow the presumption the *prima facie* force of a presumption of law. "The presumption that the accused intended the natural and probable consequences of his own

acts is not one of law to be applied by the court, but one of fact to be weighed by the jury." *Madden v. State*, 1 Kans. 340, 356 (1863). "The intention may be inferred from the act, but this in principle is an inference of fact to be drawn by the jury, and not an implication of law to be applied by the court." *People v. Stokes*, 53 N. Y. 164 (1873). In a later New York case (*Thomas v. People*, 67 N. Y. 218 (1876)) the court of appeals sustain a ruling that the facts that the prisoner used a deadly weapon, and aimed at and struck a vital part, were presumptive evidence of an intent to kill. "He must be presumed to have intended the natural consequences of his act, just as if he had aimed at the heart of the deceased and fired a gun. It was not charged that the evidence was conclusive, but simply that it was presumptive, and it was left to the jury to determine the fact upon the evidence under the charge as given." "The intent may be inferred from the act, but this, in principle, is an inference of fact to be drawn by the jury, and not an implication of law to be applied by the court." *State v. Swayze*, 30 La. Ann. pt. 2, 1323 (1878).

MALICE. — The example given by Mr. Greenleaf of the "conclusive presumption" of intent is also affirmed by the learned author: — "Therefore the intent to kill is conclusively inferred from the deliberate violent use of a deadly weapon." This is the so-called "conclusive presumption of malice." Exactly how it came about that the most vital part of the government's case in an indictment for murder could be established without proof has, as might be expected, furnished somewhat of a mystery to the courts. Much learning has been displayed in weighing the claims of the "presumption of innocence" against this so-called "conclusive presumption" of malice. In fact, neither of these so-called presumptions are presumptions at all. The "presumption of innocence" merely states the burden of proof in criminal cases. The "presumption of malice" probably owes its origin to another branch of positive law. It was at first, in all probability, merely a rule of judicial construction. The jury in cases of murder frequently found special verdicts:—stating the facts and reserving the questions of law for the court to pass upon. When, on such a verdict, the mere fact was stated of a "killing," without circumstances of justification or excuse, the courts very naturally ruled that, as a question of how to construe this language, they must understand killing to be "voluntary," for the plain reason that, had circumstances of justification or excuse existed, it was the duty of the jury to have stated them. Their not having done so must be taken to mean that none such existed. Thus *Plummer's Case* (*Rex v. Plummer*, Kelyng, 109 (1701)). The indictment was for murder. The jury returned a special verdict that under certain circumstances therein stated, one of a company of smugglers "did shoot off the fuzee

and thereby did kill " one of the others. The court, by the chief-justice, in construing this verdict say: "It seems to me hard upon a Special Verdict to construe that the fuzee went off by accident, but it must be understood to be voluntary; though even in an Indictment for Manslaughter, it is requisite that it should be averred that he discharged it voluntarily; but in a Verdict it need not be so alleged, but the saying he did it must be understood to be with, and not against his will; for where any one upon any killing of a Man is to be discharged by an involuntary killing, it must be so found, without which it will be understood to be voluntary; for a Man being a free Agent, if he be found to do any Act, it must be supposed to be with his will, unless it be specially, and particularly found to be against his will. Therefore when a Man is indicted for a voluntary killing, if he did kill the Man by misadventure, the special Circumstances of the Case must be found that it may appear to the Court to be by accident." In *Oneby's Case* (*Rex v. Oneby*, 2 Raym. 1485, 1494, 2 Strange, 766 (1727) the court say, "Although there are many special verdicts in indictments for murder, there never was one, where the jury find in express terms that the act was done with malice, or was not done with malice prepense, or that it was done upon a sudden quarrel and in transport of passion, or that the passion was cooled or not cooled; or that the act was deliberate or not deliberate; but the collection of those things from the facts found, is left to the judgment of the court." In reply to an objection that the homicide was on a sudden quarrel and so manslaughter, the court say, "I must first take notice, that where a man is killed, the law will not presume that it was upon a sudden quarrel, unless it is proved to be."

The general reason for the rule is stated in Lord Raymond's report of the same case at page 1497. In commenting on Legg's Case (*Kelyn*, 27) the court say: — "If A. kills B. and no sudden quarrel appears, it is murder; for it lies on the party indicted to prove the sudden quarrel; and therefore the jury not having found any such thing for the prisoner's benefit, it is to be took, there was no such." This rule of construction is probably the origin of the so-called "presumption of malice." To turn this rule of construction into a rule of evidence is precisely to reverse it. In construing the special verdict malice is presumed because it must have been proved to the jury. As a rule of evidence malice, it is said, need not be proved at all, but is *conclusively presumed* on mere proof of the killing.

The rule that malice is conclusively presumed from deliberate killing has been either, (1) repudiated in the American courts or, (2) so explained as to render it of but little practical effect.

(1) Among the courts which decline to recognise this "conclusive

presumption" are the following. The supreme court of Indiana say: — "Whatever the origin of the rule may be, we are convinced that it is entirely arbitrary, contrary to the reason and the analogies of the law of criminal procedure, both at common law and under our procedure and code." *Clem v. State*, 31 Ind. 480, 484 (1869). In *Farris v. Com.* 14 Bush, 362 (1878), on an indictment for murder the trial court ruled: — "Malice is implied by the law from any cruel and unnecessary act done by one person to another, and from the deliberate and unnecessary use of a deadly weapon." It will be noted, in passing, that this ruling does not come up to the level of a "conclusive presumption," but is stated in the language of a presumption of law. But even this modified expression of the doctrine was held to be error. "Malice," the court hold, "is necessarily a constituent element in the crime of murder, and must be established by evidence to the satisfaction of the jury, as any other fact necessary to make out the offence, and it is no more within the province of the court to determine, than the fact of death or the character of the weapon used to inflict it." In *Tennessee (Coffee v. State)*, 3 Yerger, 283 (1832), a ruling that, "if the fact of killing by the defendant be proved, the law implied him guilty of murder unless the proof clearly and satisfactorily showed the offence was one of less magnitude," was held erroneous. "There is no reason in saying that a jury must acquit upon a doubt as to the fact of killing, and yet upon a stronger doubt as to the equally important fact of malice, they must convict." *Ibid.* In *People v. Stokes*, 53 N. Y. 164 (1873), the court of appeals say, "Argument seems unnecessary to demonstrate the error of this charge. It was a necessary part of the case of the prosecution to establish that the homicide was perpetrated with a premeditated design to effect the death of the person killed. Yet the court, assuming to determine what the circumstances of the killing were, solemnly instructed the jury that, the fact of killing being conceded, the law implied malice." See also *People v. Downs*, 123 N. Y. 67 (1890).

(2) In other jurisdictions, the so-called "conclusive presumption" of malice from proof of killing is treated, not as conclusive, but as an ordinary presumption or inference of law unless and until evidence is introduced, by one side or the other, of justification or excuse. When such evidence is introduced, the presumption, as such, is, like any other presumption of law, as distinguished from a presumption of fact, *functus officio*. There is reason for thinking that the courts have not in all cases been careful to distinguish between the burden of proof (which, in a criminal case, never leaves the government) and the "burden of introducing evidence," which, in case of murder, upon the establishment by the government of a deliberate killing, without justification or excuse, obviously rests, for any justification or excuse, upon the defence; —

whether this burden of establishing evidence is, strictly speaking, shifted by the establishment of a presumption of law from killing itself, or not.

The supreme court of Massachusetts shows the tendency manifested by the courts which do not repudiate the presumption, but "draw its sting." In *York's Case* (Com. v. York, 9 Metc. 91 (1845), the court was divided on this "presumption of malice." The majority, in an exhaustive opinion by Chief Justice Shaw, adopt the view that when the fact of killing is proved, the accused must establish any facts of justification or excuse by a preponderance of the evidence. As they say, "It will not be sufficient to make it doubtful or questionable. It must preponderate." From this opinion, Mr. Justice Wilde dissented. The dissenting opinion has been, by general professional opinion, considered to contain the better law. In his view "The question depends entirely upon the rule of law as to the burden of proof. If the burden of proof, throughout the trial, was on the Commonwealth, the instructions to the jury were clearly incorrect; if, on the contrary, it was on the prisoner, after the proof of the homicide as charged, he has no ground of exception. . . . The counsel for the Commonwealth contends, that, the homicide having been proved as charged, the law presumes malice, and consequently that a *prima facie* case for the government was fully proved, and thereupon the burden of proof shifted, and was thrown on the prisoner, to make it appear that the homicide was excusable, or was committed on such provocation as would be sufficient to reduce the crime to manslaughter. This argument cannot be maintained, unless the law of homicide as to the burden of proof is an exception to the well-established rule of law in all other cases. . . . In criminal cases, the burden of proof never shifts, so long as the defendant grounds his defence on the denial of any essential allegation in the indictment. . . . And how can the principle vary when a *prima facie* case is made out partly by presumption? If on the whole evidence, the jury had a reasonable doubt of the prisoner's guilt as charged, they could not be justified in convicting him." After examining the authorities cited by the majority, and tracing them all back to *Oneby's Case* (2 Ld. Ray. 1485 (1727), — a case of special verdict, — he reaches the conclusion that "These principles and authorities are wholly irreconcilable with the presumption of malice on which the counsel for the Commonwealth relies. No malice can be inferred from the mere act of killing. Such a presumption, therefore, is arbitrary and unfounded." The results of a full examination of the entire field are summed up by the learned judge in three propositions; — which have frequently been cited with approval, as a clear and concise statement of the law. He holds: "(1.) That when the facts and circumstances accompanying a homicide are given in evidence, the question whether the

crime is murder or manslaughter is to be decided upon the evidence, and not upon any presumption from the mere act of killing. (2) That if there be any such presumption, it is a presumption of fact, and if the evidence leads to a reasonable doubt whether the presumption be well founded, that doubt will avail in favour of the prisoner. (3) That the burden of proof, in every criminal case, is on the Commonwealth to prove all the material allegations in the indictment; and if, on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him."

A few years later, in *Com. v. Hawkins*, 3 Gray, 463 (1855), Chief Justice Shaw himself, interrupting counsel when proceeding to argue in favour of the dissenting opinion in *York's Case* (*ubi supra*), remarked, according to the report (page 465), "that the doctrine of *York's Case* was that where the killing is proved to have been committed by the defendant, and *nothing further is shown*, the presumption of law is that it was malicious and an act of murder; and that this was inapplicable to the present case, where the circumstances attending the homicide were fully shown by the evidence," and charged that "if the jury, upon all the circumstances, are satisfied beyond a reasonable doubt, that it was done with malice, they will return a verdict of murder; otherwise, they will find the defendant guilty of manslaughter." Though there is reason to doubt whether *York's Case* would still be followed even in Massachusetts on precisely the same facts, the qualification on the rule laid down in *Com. v. Hawkins* (*ubi supra*) effectually removes the practical mischief of the rule, as it probably can but seldom happen that, in any given case, the killing and no other fact will appear in evidence.

The Vermont courts follow the rule laid down in *Com. v. Hawkins* (*ubi supra*), in holding that the homicide is presumed to be malicious only when nothing except the killing is shown, and follow the learned chief justice (Shaw) by quoting his very clear and concise ruling in that case. "The murder charged must be proved; the burden of proof is on the Commonwealth to prove the case; all the evidence on both sides which the jury find true is to be taken into consideration and if, the homicide being conceded, no excuse or justification is shown, it is either murder or manslaughter; and if the jury, upon all the circumstances, are satisfied beyond a reasonable doubt that it was done with malice, they will return a verdict of murder; otherwise they will find the defendant guilty of manslaughter." *State v. Patterson*, 45 Vt. 308 (1873).

In Maine in a case where the trial court ruled that "in all cases where the unlawful killing is proved and there is nothing in the circumstances of the case, as proved, to explain, qualify, or palliate the act, the law presumes it to have been done maliciously; and if

the accused would reduce the crime below the degree of murder, the burden is upon him to rebut the inference of malice which the law raises from the act of killing, by evidence in defence," — the instruction, "not having been satisfactorily shown to be erroneous," was sustained. *State v. Knight*, 43 Me. 12, 137 (1857).

In Texas, the trial court had charged the jury that "they should look to all the facts and circumstances attending the homicide, as disclosed by the evidence, and if they disclosed no facts or circumstances which reduce the offence to negligent homicide or manslaughter, or which excuse or justify the fact, the law, in such cases, implies malice and makes such killing murder." The court on appeal say: — "We are unable to discover any error in this instruction calculated to injure the rights of the defendant." *Brown v. State*, 4 Tex. App. 275 (1878).

In Louisiana, the trial judge charged that "where the killing is proved, malice is presumed by the law from the fact of killing, and that it was incumbent on the accused to prove any matter of excuse or extenuation." Held, error. "The circumstances which surround the act either attest or negative a criminal intent. If none exist, the court — as said by Mr. Greenleaf — is justified in charging that from the act of killing, *unaccompanied by circumstances of extenuation*, malice is presumed (he should have said '*may be inferred*') and that the burden of disproving it is then thrown upon the accused. This rule is as correct as rational, and its application would prevent an otherwise unavoidable conflict between the presumption established by law in favour of the state and of the prisoner. The intent may be inferred from the act; but this, on principle, is an inference of fact to be drawn by the jury, and not an implication of law to be applied by the court." *State v. Swayze*, 30 La. Ann. pt. 2, 1323 (1878). In a later case in the same court, the trial judge had charged that the state must prove, 1. The killing; 2. That the prisoner did it, and that "when this is done, the law presumed malice." Held error. "The jury must be instructed to weigh and consider all the circumstances arising from, or connected with, the evidence proving the homicide, and that the presumption of the innocence of the accused must yield to the presumption of malice or deliberate intent, only when the evidence is unaccompanied by circumstances showing alleviation, justification, or excuse." *State v. Trivas*, 31 La. Ann. 1086 (1880).

In Mississippi, the rule is laid down thus: — "We understand the settled rule to be this: The law presumes the accused to be innocent of the crime charged, until the contrary is made to appear; but when it is shown that he killed the deceased with a deadly weapon, the general presumption of innocence yields to the specific proof of such homicide, and the law infers that it was malicious and therefore murder, because, as a rule, it is unlawful to

kill a human being, and it is murder if not something else, and as special circumstances alone can vary the legal view of homicide so as to relieve it from the character of murder, it is inferred or presumed to be such from the fact of killing, unexplained; but if the attendant circumstances are shown in evidence, whether on the part of the state or the accused, the character of the killing is to be determined by considering them, and it is then not a matter for presumption, which operates in the absence of explanatory evidence, but for the determination from the circumstances shown in evidence." *Hawthorne v. State*, 58 Miss. 778 (1881).

In North Carolina, a charge was sustained, "that a presumption in favour of innocence prevailed, until overcome by evidence of the truth of the criminal charge, and this must be such as to remove all reasonable doubt from the mind. That when such proof of the homicide is presented, matters in excuse or mitigation must appear, or be shown, not beyond a reasonable doubt, but to the satisfaction of the jury. The prisoner admitting the killing by means of a shot from a pistol, that instrument, thus used, is a deadly weapon, and the law implies malice, unless its absence is made to appear, and this must be to the satisfaction of the jury." *State v. Potts*, 100 N. C. 457 (1888). See also *State v. Smith*, 77 N. C. 488 (1877).

In Georgia, the court approve a ruling that "When the state has shown the defendant has done the killing, such killing would be presumed to have been done with malice, unless the defendant or the circumstances of the case show the contrary." *Marshall v. State*, 74 Ga. 26 (1884).

In Alabama, the supreme court indorse a ruling that "When life is taken by the direct use of a deadly weapon, the law presumes that the killing was malicious and therefore murder, and casts upon the defendants the onus or burden of rebutting it; unless the evidence establishing the killing also shows circumstances of justification, excuse, or mitigation, which overturn the presumption." The court say: "There was no error in that portion of the charge." *Gibson v. State*, 89 Ala. 121 (1889). See also *Sylvester v. State*, 72 Ala. 201 (1882).

It will be observed that in no instance throughout these rulings is the presumption of malice spoken of as *conclusive*.

MALICE IN LIBEL.—It is said by the learned author (§ 83), following Mr. Greenleaf (in § 18), that the deliberate publication of calumny, which the publisher knows to be false, or has no reason to believe to be true, raises a conclusive presumption of malice." Like other so-called "conclusive presumptions" this is a rule of substantive law, having no direct relation to the law of evidence. It amounts to saying that, under the law of libel, malice is immaterial. If a defamatory statement is false and made without reasonable and probable cause, the publisher is legally (even if not

morally) liable. As Judge Cooley says (Cooley, Torts, 245): "It seems misleading, therefore, to employ the term malice, and malicious, in defining these wrongs; and, in a legal sense, as used, they can only mean that the false and injurious publication has been made without legal excuse." So in an action for slander, *Bromage v. Prosser*, 4 B. & C. 247, 255 (1825), Bayley J., said, "Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse." Certainly this is true of the law of libel, where no question of privilege is involved. So in a Pennsylvania action for libel, the court say, "In its common acceptation malice means ill-will against a person; but in its legal sense it means a wrongful act done intentionally, without just cause or excuse, and therefore every utterance or publication having the other qualities of slander or libel, if it be wilful and unauthorised, is in law malicious." *Barr v. Moore*, 87 Pa. St. 385 (1878). See also *Moore v. Stevenson*, 27 Conn. 14 (1858).

"The publication of what is necessarily injurious, and done purposely and knowingly, and not for any good purpose or justifiable end, is legally malicious in the law of libel." *McLean v. Scripps*, 52 Mich. 214 (1883).

"The court properly declined to instruct the jury . . . that if the defendant acted *bona fide* in the discharge of what he believed to be his duty, the action could not be maintained without extrinsic proof of express malice." *Smart v. Blanchard*, 42 N. H. 137 (1860). "If a publication be libellous and not privileged, the law implies that it was malicious. This is not a mere presumption, which may be wholly overcome by proof, but it is a legal conclusion which cannot be rebutted." *Lick v. Owen*, 47 Cal. 252 (1874). The supreme court of Wisconsin holds, except in questions of privilege, that "In all other actions for libel and slander, malicious intent constitutes no part of the issue, but is or may be considered only as a circumstance in aggravation of damages." *Wilson v. Noonan*, 35 Wis. 321, 349 (1874). See also *Lewis v. Chapman*, 16 N. Y. 372 (1857).

It is merely putting the rule in another form to say that "When the appellant proved the publication of the article, the law implied malice, and appellant was entitled to recover such compensatory damages as he had sustained, regardless of the intent that actuated the appellee in the publication of the libel." *Rearick v. Wilson*, 81 Ill. 77 (1876). "In common parlance malice means ill-will against a person, but the law attaches a different meaning. In its legal sense the term implies an act wrongfully and intentionally done, without just cause or excuse, and does not necessarily imply malevolence of disposition or enmity toward any particular individual." *Pennington v. Meeks*, 46 Mo. 217 (1870). See also *Indianapolis*

Sun. Co. v. Horrell, 53 Ind. 527 (1876). "The falsity of the libel is sufficient proof of malice to uphold exemplary damages." *Bergmann v. Jones*, 94 N. Y. 51 (1883). "Where the words spoken or written are shown to be within a confidential or privileged communication, the presumption of malice no longer exists; but the plaintiff in such a case must show express malice, and cannot rely on the presumption of malice which the law attaches in all other cases to the utterance or publication of the words spoken or written." *Dillard v. Collins*, 25 Gratt. 343 (1874).

MALICE IN OTHER CONNECTIONS. — In all cases where the existence of malice is a material fact, except in the anomalous case of homicide above referred to, it must be proved like any other fact. For example, on an indictment for maliciously placing obstructions on the track of a railroad. *State v. Hesseukamp*, 17 Ia. 25 (1864); *Com. v. Bokeman*, 105 Mass. 53 (1870). So of malicious mischief. *Com. v. Williams*, 110 Mass. 401 (1872).

OTHER CONCLUSIVE PRESUMPTIONS. — The other conclusive presumptions referred to by the learned author are equally rules of substantive law. The conclusive effect of judgments, for example, is properly referable to that subject, see *post*, § 1682. The law of estoppel is a branch of substantive law, considered *ante*, § 89. So the rules as to the conclusiveness of a default upon due service of process have clearly no relation to the law of evidence. That an award binds the parties, if within the scope of the submission; that a document under seal requires no consideration; — these and many others stand on the same footing. Most rules of substantive law seem capable of being made an apparent part of the law of evidence, by simply saying that "evidence is admissible to show, &c.," or "evidence is not admissible to show," according as the rule of positive law is in form affirmative or negative.

ANCIENT DOCUMENTS. — The rule relating to ancient documents differs from those above-mentioned by being legitimately part of the law of evidence. There seems, however, but little reason for stating the rule in the form of a conclusive presumption, or indeed in the form of a presumption at all. A well recognised rule of evidence requires that the execution of a written instrument, executed in presence of a subscribing witness, should be proved by the subscribing witness, or, in case of his death, disability, or justifiable absence, by proof of his signature. In case there is no subscribing witness, the signature of the party must be proved, unless admitted. See *post*, § 1839.

Ancient documents, — *i. e.* documents at least thirty years old, produced from the proper custody and free from circumstances of suspicion, form a recognised exception to this rule. Their production and inspection is sufficient evidence of execution. If there is a subscribing witness, he need not be called. No proof is

necessary of the signature of an unavailable subscribing witness, or of a party. If the document is relevant, it goes in evidence on its face. It is said that the subscribing witnesses are "conclusively presumed to be dead." It is perhaps quite as accurate to say that the rule applies, whether they are dead or not, or even whether they are in court or not. There seems to be no inference, presumption, or question of proof about the matter. It is simply a question of a rule. The rule dispenses with living evidence if the witnesses are alive; of proof of signatures, if they are dead. All is, a document thirty years old proves itself. This, of course, is by no means the same thing as saying that it is admissible. To be admissible, the evidence must also be relevant and not the subject of any rule of exclusion.

For example, the Massachusetts supreme judicial court say: — "It is an old and well-settled rule of evidence, that registered deeds which appear to be thirty years old, and which have been followed by possession under them, may be given in evidence, without any proof of their execution. After such a lapse of time the witnesses are presumed to be dead. And it is said to be a peremptory rule of law, found to be both safe and convenient, that, after a lapse of thirty years, a deed, unaccompanied by any circumstances of suspicion, may be admitted without proof of its execution." *Green v. Chelsea*, 24 Pick. 71 (1836); *Henthorne v. Doe*, 1 Blackf. 157 (1822); *Thruston v. Masterson*, 9 Dana, 228 (1839); *Carter v. Chandron*, 21 Ala. 72, 91 (1852); *McReynolds v. Longenberger*, 51 Pa. St. 13, 31 (1868); *Duncan v. Beard*, 2 Nott & McC. 400 (1820); *Clark v. Owens*, 18 N. Y. 434 (1858); *Burgin v. Chenault*, 9 B. Monr. 285 (1848); *Weitman v. Thiot*, 64 Ga. 11 (1879). So in speaking of a memorial of an ancient deed, the court of queen's bench of Upper Canada hold, "The principle of receiving in evidence documents more than thirty years old, without proof of their authenticity, is not confined to the deeds themselves, but extends to any written documents whatever, even to letters." *Doe v. Turnbull*, 5 Q. B. U. C. 129 (1848).

The supreme court of Georgia, speaking of a witnessed receipt over thirty years old, say, "It was properly admissible in evidence on the ground that it was more than thirty years old, and therefore its execution need not have been proven at the trial. In admitting written documents in evidence, when more than thirty years old, the courts do not go altogether upon the presumption that the subscribing witnesses are proved to be dead, but they adopt that limit of time, beyond which proof of the execution of written instruments will not be required, although the subscribing witnesses may be alive." *Settle v. Alison*, 8 Ga. 201 (1850). So of a will. "The reason of the law, in dispensing with the attendance of witnesses to a deed of thirty years' standing, and where possession

has been held under it, is founded upon the presumption that they are dead, and the impossibility of proving its execution; and although they are, in fact, alive, it is not necessary to produce them, for the rule is general in its operation. The reason of this rule applies to the time of the execution of a will, and not to the death of the testator, for the same difficulty of proof exists in the one case as in the other." *Jackson v. Blanshan*, 3 Johns. 292 (1808). "The rule on this subject is, that when instruments are more than thirty years old, and are unblemished by any alterations, and obtained from the proper custody, they are said to prove themselves, and the bare production is sufficient, the subscribing witnesses or all living witnesses of the transaction being presumed to be dead; and this presumption, as far as this rule of evidence is concerned, is not affected by proof that there are witnesses living. But it is essential that it appear that the instrument or instruments come from such custody as to afford a reasonable presumption in favour of their genuineness and be otherwise free from just grounds of suspicion." *Reynolds v. Longenberger*, 57 Pa. St. 13, 31 (1868).

The rule is arbitrary. A document twenty-nine years old is excluded. *Glasscock v. Hughes*, 55 Tex. 461 (1881).

Where a deed was executed under a power, the power, if an ancient document, proves itself equally with the deed made under it. But if the power is on record, neither are admissible, unless the power or a copy of it is produced. *Tolman v. Emerson*, 1 Pick. 160 (1826).

The supreme court of Illinois have gone further;—holding that ancient documents cannot be admitted in evidence when purporting to be executed by one acting in a fiduciary character, in the absence of proof of his authority to make the deed. *Fell v. Young*, 63 Ill. 106 (1872).

Where there are circumstances of suspicion concerning a document over thirty years old, if the evidence explains or refutes such circumstances, the document is entitled to the benefit of the rule. *Walton v. Coulson*, 1 McLean, 120 (1831). To come under the rule, "It is not sufficient . . . that the instrument merely bears date thirty years before the time of its production. It is necessary to show that it has been in existence for that period of time; and that may be done not only by evidence of its execution, by the maker, or of its possession by the party claiming under it for that period, but by circumstances creating the presumption of such existence." *Fairly v. Fairly*, 38 Miss. 280 (1859). In New York existence for thirty years is not sufficient. "If possession has accompanied the deed, for that length of time, that is enough. If not, other circumstances may be resorted to for the purpose of raising the necessary presumption in favour of the deed." *Clark v. Owens*, 18 N. Y. 434 (1858).

That a predecessor in title relied on such ancient deed is sufficient to admit it. Whether without this it would have been admissible, *quære*. *Burgin v. Chenault*, 9 B. Monr. 285 (1848).

In Massachusetts, "If a subscribing witness be alive, he shall be called to prove the deed, although it be more than thirty years old." *Tolman v. Emerson*, 1 Pick. 160 (1826), citing *Jackson v. Blanshan*, 3 Johns. 292 (1808), which, by the way, does not support it.

The basis of such presumption as may exist in the matter is probably found in *Duncan v. Beard*, 2 Nott & McC. 400 (1820): "After a lapse of thirty years it is difficult, and in most cases impossible to procure the witnesses to the deed. Those who are parties to a deed of thirty years' standing, must be upwards of fifty years old, and a large portion of those who are born, die before that period."

The rule relating to proving the execution of ancient documents must not be confused with the somewhat analogous rule that ancient records from proper custody are admissible to show facts of ancient title, without further attestation. For example, "Ancient books purporting to be record of the Lower Housatonic Proprietary" produced from the custody of the clerk, "were properly admitted as evidence, without any further proof of the original and continued organisation of the proprietary. This species of evidence is that usually introduced in tracing ancient titles, and has long been sanctioned by this court." *King v. Little*, 1 Cush. 436 (1848).

So the supreme court of New Hampshire hold that an "ancient book of records, purporting to be the proprietary records of Rumney, accompanied as it was by an admission that it came from the custody of the town clerk of Rumney, the proper depositary, by statute, of the public records of that character belonging to the town, was properly admitted in evidence, without proof that it contained the records of the original proprietors of the town. . . . The jury may well presume many things, which it would be indispensable to prove in relation to more recent documentary evidence." *Little v. Downing*, 37 N. H. 355, 365 (1858).

The other conclusive presumptions mentioned by the learned author fall into the same class. They are rules of positive law. Thus that a child under seven cannot be guilty of felony; that a boy under fourteen cannot be guilty of rape and certain kindred crimes; that a female child under a fixed age cannot legally consent to certain sexual acts, — are among the rules of criminal law, common or statutory. That an infant under a given age cannot dispose of real or personal property in certain ways; that the children of husband and wife begotten during their cohabitation cannot be shown to be illegitimate by the testimony of the parents, — all present no question in the law of evidence.

(2) **Fictions.** — Courts have usually been sensitive about confessing that they are making law rather than declaring it. A common method of concealing this frequent and often valuable process has been by interpretation. Another has been by the creation of *fictions*. Now, it is obviously essential to the value of a legal fiction that it should not be disputed. The casual loss by the plaintiff and the finding by the defendant, in an action of trover; the promise in an *indebitatus assumpsit*, for example, would have been of but little use, as fictions, if they could have been traversed and an issue raised on them. The fiction was necessarily non-issuable and, as in other cases, where a fact is not issuable, it has been “conclusively presumed” to exist.

A modern instance will illustrate this process of legal development. The circuit courts of the United States have acquired jurisdiction over suits between corporations organised under the laws of different states, or where the other party is a citizen of a different state, by establishing the fiction that the members of any corporation before them are all citizens of the state to which such corporation owes its charter. This is done by *conclusively presuming* them to be so.

“A corporation itself can be a citizen of no state in the sense in which the word ‘citizen’ is used in the Constitution of the United States. A suit may be brought in the Federal courts by or against a corporation, but in such a case it is regarded as a suit brought by or against the stockholders of the corporation; and, for the purposes of jurisdiction, it is conclusively presumed that all the stockholders are citizens of the state which, by its laws, created the corporation.” *Muller v. Dows*, 94 U. S. 444 (1876).

“The members of the corporate body must be presumed to be citizens of the state in which the corporation was domiciled and that both parties were estopped from denying it.” *Louisville, &c., R. R. v. Letson*, 2 How. 497 (1844), cited in *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 233 (1857); *Ohio & Mississippi R. R. v. Wheeler*, 1 Black, 286, 297 (1861); *R. R. Co. v. Whitton*, 13 Wall. 270 (1871). The same rule applies to a corporation created under the laws of the United States, *e. g.* a National Bank; *Manufacturers, &c., Bank v. Baack*, 2 Abb. Circ. Ct. 232 (1871).

Presumptions. — Presumptions, strictly so called, are divided into two main classes, “Presumptions of Fact” and “Presumptions of Law.” The presumption of fact is, as has been said, the logical inference of the existence of one fact from proof of another. It is the only real presumption, as the “presumption of law” is an assumption of jurisprudence that a given presumption of fact has a certain probative force, to wit: that it establishes a *prima facie* case, or, in other words, that a tribunal of fact would be justified in

acting on it in the absence of evidence to the contrary. It is, therefore, a rule of law, concerning presumptions. It is a *levamen probationis*, rather than proof itself. It is, like an admission, or other *levamen probationis*, rather a fact to be proved by evidence, than evidence to prove a fact. Presumptions of law are rules of law; and a rule has no probative force. The phrase "presumption" has proved a very favorite one in judicial reasoning, and it apparently embodies many different meanings. In deciding whether, in any particular case, we are dealing with a *bona fide* presumption or a counterfeit, but one infallible test presents itself, — to weigh it in the scales of logic. If the "presumption" shows probative weight, it is a presumption. If it does not, it is something else, — usually a rule of positive law, or possibly one of pleading. A useful way of verifying this result will be to see whether the so-called "presumption" can be exactly restated as a rule of positive law or pleading. A true presumption does not lend itself readily to this process; but a rule which has been paraphrased from the positive law into the language of presumption can usually be paraphrased back again. Good illustrations of this process may be found in the so-called "presumption of innocence," or the "conclusive presumption that every one knows the law."

A "presumption" (or assumption) of law, Mr. Wharton (2 Whar. Ev. § 1237) well says, "derives its force from jurisprudence as distinguished from logic." Perhaps it would be fully as accurate to say that its force is derived from a definite weight, which jurisprudence, in certain cases, has seen fit to give to logic. The law of evidence alone does not fix rules for carrying on a line of reasoning. But courts, from early times have apparently felt under pressure of an obligation to the general community for the promotion of certainty in the rules of law. They have constantly tried to lessen the field of the uncertain and the debatable in connection with rights and liabilities; to make repeated trials of fact settle something valuable generally; to prevent, so far as possible, the useless expense and annoyance of trying the same question of fact over and over again. As in cases of negligence, reasonable care, due diligence, &c., the effort is to "lay down a rule about it" which will remove some element of uncertainty as to what the legal standard really is. In its dealings with the jury this feeling has apparently been intensified by practical dangers which a permanent tribunal, realising the value of precedent, and responsible for the larger consequences of litigation, would readily perceive might arise from the uncontrolled and unaided efforts of a casual tribunal, little given to the solution of the problems which they were called upon temporarily to solve, and much more apt to be moved by the facts of a particular case than by a consideration of the remoter social consequences of permitting themselves to follow their feel-

ings. Partly to guide the jury, and perhaps largely to control it; partly to bring the experience of the past to their aid, and partly to enforce the use of correct reasoning, or retain in the court a power which it was undesirable the jury should exercise,—the court naturally and early adopted the practice of stating to the jury that certain plain, obvious inferences or “presumptions” of fact they might safely assume to be correct, until they were disputed by other evidence on the same point. When conflicting evidence was gone into, the “assumption” they had been asked to make would of course be gone, and it became the duty of the jury to weigh all the evidence, including the presumption of fact which they could have assumed to be correct if it had been alone. It is obvious that this action on the part of the court practically amounts to a ruling as to the burden of proof in the sense of the “burden of introducing evidence.” This burden rests always on him against whom the tribunal of fact would decide if no more evidence were introduced. In other words, at the opening of the case, it rests, together with the “burden of establishing,” on him who has the affirmative of the issue, but may shift during the trial whenever the party on whom it has rested succeeds in establishing a *prima facie* case in his own favor. Proof of a presumption of fact sufficiently strong to be assumed by the law to be correct, establishes such a *prima facie* case. Hence it is said that “a presumption of law shifts the burden of proof;” which is true, if the burden of introducing evidence is meant. When the party on whom this burden of evidence now rests introduces evidence to show that the assumption of law is incorrect in the particular case, the “assumption” is *functus officio* as such, leaving the presumption of fact to have its probative force. It simply has ceased to be assumed to be correct. *U. S. v. Wiggins*, 14 Pet. 334, 347 (1840). There is nothing in the above practice to conflict with the rule that the probative force of a presumption is always a question for the jury. “Whenever evidence is offered to the jury which is in its nature *prima facie* proof, or presumptive proof, its character as such ought not to be disregarded; and no court has a right to direct the jury to disregard it, or to view it under a different aspect from that in which it is actually presented to them. Whatever just influence it may derive from that character, the jury have a right to give it.” *Crane v. Lessee of Morris*, 6 Peters, 598, 620 (1832).

The facts on which the presumption or inference is claimed must be themselves proved by affirmative evidence. They cannot be themselves presumed. A presumption on a presumption is not permitted. “A presumption which a jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption.” *U. S. v. Ross*, 92 U. S. 281 (1875); *Douglass v. Mitchell*, 35 Pa. St. 440 (1860).

Illustrations of certain of the more usual and definite presumptions of law have been cited by the learned author.

"PRESUMPTION OF INNOCENCE."—This is a spurious presumption, and merely a paraphrase of the usual statement of the rule of the burden of proof in criminal cases;—that the burden is on the government to prove beyond a reasonable doubt all facts material to the offence charged. Mr. Justice Stephen (Dig. Law of Evid. Art. 94) frankly abandons this so-called "presumption." It rests apparently on no probative basis of fact. Speaking of the rights of a prisoner, the supreme court of Ohio say: "The benefit of the presumption of innocence was fully and practically secured to him in the instruction that the state must prove the material elements of the crime beyond a reasonable doubt." *Morehead v. State*, 34 Oh. St. 212 (1877); *Hemingway v. State*, 68 Miss. 371, 408 (1890). "The first instruction prayed puts the point, whether the burthen of proof of the offences charged in the indictment does not rest upon the United States. Without question it does in all cases where a party stands charged with an offence, unless a different provision is made by some statute; for the general rule of our jurisprudence is that the party accused need not prove his innocence; but it is for the government itself to prove his guilt before it is entitled to a verdict or conviction." *U. S. v. Gooding*, 12 Wheat. 460, 471 (1827).

Where the charge covered the rule as to burden of proof, but did not state the "presumption of innocence," held, no error. *Hutto v. State*, 7 Tex. App. 44, 49 (1879). "A reasonable doubt must be charged in every felony case whether asked or not." *Ibid.*

The nature of this so-called presumption is seen when the attempt is made to use it in a probative capacity. So tested, it cannot be used as evidence of the fact of innocence. For example, on an indictment charging the seduction of a woman "of previously chaste character," affirmative evidence of the woman's chastity must be furnished, the presumption of innocence furnishing no evidence of it whatever. The court say that the presumption of innocence is "always to be used in the administration of justice as a weapon of defence, not of assault. They are the shield of the accused; not the sword of the prosecutor." *West v. State*, 1 Wisc. 209 (1853); *People v. Roderigas*, 49 Cal. 9 (1874).

So on an indictment for enticing women of "chaste life and conversation," the judge at *nisi prius* ruled that it was for the government to prove their chastity, but that "in the absence of evidence to the contrary, it is a presumption of law that they were of chaste life and conversation." This was held erroneous. "This instruction permitted the jury to find that the burden on the government was satisfied by the legal presumption that the women were chaste, although the government had introduced no affirmative evidence of their chastity. . . . The defendant is presumed to be innocent until

every material allegation necessary to constitute the offence charged is proved beyond a reasonable doubt. To allow the proof of such an allegation to rest merely on the legal presumption that the women were chaste, would be to permit the presumption in favor of the defendant's innocence of the offence charged to be overborne by another legal presumption in favor of the innocence of other persons not parties to this proceeding." *Com. v. Whittaker*, 131 Mass. 224 (1881).

To the contrary effect that in an action of seduction "the chaste character of the prosecutrix was presumed, and the burden was on the defendant to overcome the presumption," see *State v. Wells*, 48 Ia. 671 (1878).

On a civil action for breach of promise of marriage, the plaintiff claimed a pretended marriage and subsequent cohabitation. The defendant being already married; held that evidence of recognition of the plaintiff as his wife, &c., would not warrant a presumption of a lawful ceremony. *Wright v. Skinner*, 17 C. P. U. C. 317 (1866).

Differing from other courts, the supreme court of Vermont apparently regards the "presumption of innocence" as having a certain probative force. See *Childs v. Merrill*, 66 Vt. 302 (1894).

"The presumption is single, and the same in all cases, and in all must be overturned by evidence which excludes every other reasonable hypothesis but that of guilt." *Hawes v. State*, 88 Ala. 37, 72 (1889).

Where proof of good character is said to raise a "presumption of innocence," a true presumption of fact is referred to, but such is not the usual meaning of the expression. *Harrington v. State*, 19 Oh. St. 264 (1869).

In many civil cases, on the analogy of the "presumption of innocence," is a so-called presumption against fraud, illegality, &c., which amounts merely, as also in many cases the so-called presumption of regularity, to a statement that the burden of evidence is upon him who relies on proof of fraud, illegality, or irregularity. "He who alleges fraud must prove it." *Parkhurst v. McGraw*, 24 Miss. 134 (1852).

So in an action on a promissory note it is for the defendant to allege and prove illegality or fraud. *Baxter v. Ellis*, 57 Me. 178 (1869).

So where a corporation was prohibited from making certain contracts after a given date, it was held, in an action on such a contract, "the presumption being that there was no violation of law," it would be presumed that the contract was made while it was yet legal to make it. *Friend v. Smith Gin Co.*, 59 Ark. 86 (1894). So where a constitutional provision prohibited towns from issuing bonds in aid of a railroad, after a certain date, held, in an action on such bonds, "Courts can presume that an act was done prior to

a period after which it could not legally have been done." *State v. Hannibal &c. R. R.*, 113 Mo. 297 (1893).

PRESUMPTION OF OWNERSHIP. — The presumption of ownership from proof of possession is one of fact based on the general experience of mankind, stated by the learned author at § 123 *supra*, that "Men generally own the property they possess." *McEwen v. Portland*, 1 Oreg. 300 (1860).

The accuracy of this presumption of fact is an assumption or presumption of law, and proof of possession is *prima facie* evidence of ownership. "The first evidence of personal property is possession. If this young man was in possession of the house; holding himself out to others as the owner; and acting as the owner, the presumption of law is that he was the owner." *Drummond v. Hopper*, 4 Harrington, 327 (1845). "Possession is *prima facie* evidence of title." *Vining v. Baker*, 53 Me. 544 (1866); *Andrews v. Beck*, 23 Tex. 455 (1859). "Possession of personal property is *prima facie* evidence of ownership." *Goodwin v. Garr*, 8 Cal. 615 (1857). So of a promissory note. Its possession at the trial is *prima facie* evidence of ownership and authority to sue. *Hovey v. Sebring*, 24 Mich. 232 (1872); *Vastine v. Wilding*, 45 Mo. 89 (1869); *Stoddard v. Burton*, 41 Ia. 582 (1875). "It is a presumption of law, that every species of property found in a person's possession at his death belongs to his succession." *Alexander's Succession*, 18 La. Ann. 337 (1866).

So in an action of trespass *quare clausum*, the court say, "The presumption of the law is, that the person who has the title is the one in possession." *Finch v. Alston*, 2 Stew. & P. (Ala.) 83 (1832).

So possession of land under a general claim of title is *prima facie* evidence, of a seisin in fee simple. *Ward v. McIntosh*, 12 Oh. St. 231 (1861). So Chief Justice Savage, in *Jackson v. Waltermire*, 5 Cowen, 301 (1826), speaking of actual possession of land, says: "This is presumptive evidence of a seisin in fee, and sufficient until the contrary appears."

"Possession of property alone and without explanation, is evidence of ownership; but is the lowest species of evidence. It is merely presumptive, and liable to be overcome by any evidence showing the character of the possession, and that it is not necessarily as owner. If the custody and possession is shown to be equally consistent with an outstanding ownership in a third person, as with a title in the one having possession, no presumption of ownership arises solely from such possession." *Rawley v. Brown*, 71 N. Y. 85 (1877).

The reasoning from experience on which the presumption is based defines its scope. "The possession of an open account in favor of another has never been held to be evidence of ownership in the holder." *Gregg v. Mallett*, 111 N. C. 74 (1892).

OMNIA CONTRA SPOLIATOREM. — The presumption that one who destroys or suppresses evidence does so because the evidence so suppressed would operate against him, seems a true presumption, *i. e.*, one of distinct probative effect. As in the case of other presumptions, it is capable of being rebutted. Thus, in prize proceedings, where it appeared that during the chase resulting in the capture, a package of papers relating to the cargo was thrown overboard by the master and super-cargo, the ship papers being retained, the court say: — “Concealment, or even spoliation of papers, is not of itself a sufficient ground for condemnation in a prize court. It is undoubtedly a very awakening circumstance, calculated to excite the vigilance and justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity, or superior force; and if the party in the first instance fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile; if the cause labour under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is made the ground of a denial of further proof, and condemnation ensues from defects in the evidence which the party is not permitted to supply.” *The Pizarro*, 2 Wheat. 227, 241 (1817).

So abstracting from the court files part of a vessel’s original report of a collision “throws great discredit on the claimant’s side of the case.” *The Sam Sloan*, 65 Fed. Rep. 125 (1894). So where a party attempts to suppress testimony by defacing a public record, it is held that the court was “justified in construing the testimony strongly” against him. *Murray v. Lepper*, 99 Mich. 135 (1894).

“The spoliation of evidence, damaging to a litigant’s cause, may constitute just as much of a fraud, as the manufacture of evidence that is favourable to it.” *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 307 (1884).

For similar reasons, a plaintiff who has deliberately and voluntarily destroyed a promissory note will not be permitted, in the absence of suitable explanation, to give secondary evidence of its contents. “I believe no case is to be found, where if a party has deliberately destroyed the higher evidence, without explanation showing affirmatively that the act was done with pure motives, and repelling every suspicion of a fraudulent design, that he has had the benefit of it.” *Blade v. Noland*, 12 Wend. 173 (1834).

So it is held error to allow the plaintiff in an action for libel to introduce secondary evidence of the contents of an alleged libellous letter which he had voluntarily destroyed. “This we think was a violation of the cardinal principle that where it appears that a party has destroyed an instrument or document, the

presumption arises that if it had been produced it would have been against his interest or in some essential particular unfavorable to his claims under it. *Contra spoliatores omnia presumuntur*. . . . He must first rebut the inference of fraud which arises from the act of a voluntary destruction of a written paper before he can ask to be relieved from the consequences of his act by introducing parol evidence to prove his case." *Joannes v. Bennett*, 5 All. 169 (1862). "It is not a matter of course to allow secondary evidence of the contents of an instrument in suit upon proof of its destruction. If the destruction was the result of accident, or was without the agency or consent of the owner, such evidence is generally admissible. But if the destruction was voluntarily and deliberately made by the owner, or with his assent, as in the present case, the admissibility of the evidence will depend upon the cause or motive of the party in effecting or assenting to the destruction." *Bagley v. McMickle*, 9 Cal. 430, 446 (1858).

Where the destruction was done in good faith;—for example, under the well intentioned though injudicious advice of a sister, the secondary evidence is receivable. *Tobin v. Shaw*, 45 Me. 331 (1858).

In a lesser degree, the same presumption arises where a material witness is withheld. "Where a party has evidence in his power and within his reach, by which he may repel a claim or charge against him, and omits to produce it, this supplies a presumption of fact that the charge or claim is well-founded. This presumption attaches with more force in cases where a party, having more certain and satisfactory evidence in his power, relies upon that which is of a weaker or more inferior nature." *Savannah, &c., R. R. v. Gray*, 77 Ga. 440 (1886). But this rule receives a reasonable construction. No presumption can be drawn against a railroad if it does not produce a witness—one of its engineers—who has gone to another state and whose residence is unknown. *Ibid.* And where the witness is "subject to the call of either party," no inference can be drawn from a failure to produce him. *Haynes v. McRae*, 101 Ala. 318 (1893); *Scoville v. Baldwin*, 27 Conn. 316 (1858).

Where the question is as to the meaning of a certain written contract which the appellant refused to produce, the court say;—"Where the adverse party has it in his power to produce evidence that would settle the question at issue, although not compelled to produce it, every intendment and presumption is to be made against the party who might remove all doubt on the question." *Benjamin v. Ellinger's Adm.*, 80 Ky. 472 (1882); *Cross v. Bell*, 34 N. H. 82 (1856); *Wallace v. Harris*, 32 Mich. 380, 394 (1875).

So the defendant's non-production of his books on notice is "strong presumptive evidence against him." *Atty-Gen. v.*

Halliday, 26 Q. B. U. C. 397 (1867). "If he does not exhibit it to the court and jury for their satisfaction, they have the right to infer that it contains evidence unfavourable to him in the matters in dispute between him and the defendants." *Lowell v. Todd*, 15 C. P. U. C. 306 (1865); *Merwin v. Ward*, 15 Conn. 377 (1843). But see *Cartier v. Troy Lumber Co.*, 138 Ill. 533 (1891). So where the defendant did not appear to testify to matters peculiarly within his own knowledge, the court say that his course "carries with it the usual unfavourable and damaging presumptions." *Connecticut Mut. Life Ins. Co. v. Smith*, 117 Mo. 261 (1893).

The limits of the rule are well defined in a Michigan case. Where a female plaintiff was absent, without excuse, a ruling "that if she was absent when able to be present, the jury might consider that as evidence tending to impeach the good faith of her claim" was held correct. An instruction that there was a presumption of law that, if she had testified, her testimony would have hurt her was held to have been properly refused. *Cole v. Lake Shore, &c. R. R.*, 95 Mich. 77 (1893). So where parties refuse to obey the precept of a *subpoena duces tecum*, the court say that "it is a circumstance that the jury could have considered as a fact tending to show a purpose upon the part of appellees to suppress evidence against them." *Darby v. Roberts*, 3 Tex. Civ. App. 427 (1893).

But the "mere non-production of books, upon notice, has no other effect than to admit the other party to prove their contents by parol. . . . Any presumption against him can only be on the ground that he withholds evidence and *omnia contra spoliatores*. But this rule cannot operate where all that is done is not to produce evidence which can only go in by consent of the other side." *Cartier v. Troy Lumber Co.*, 138 Ill. 533 (1891).

"Where withholding testimony raises a violent presumption that a fact not clearly proved or disproved exists, it is not error to allude to the fact of withholding as a circumstance strengthening the proof." *Frick v. Barbour*, 64 Pa. St. 120 (1870); *Gulf, &c., R. R. Co. v. Ellis*, 54 Fed. Rep. 481 (1893).

"The non-production of evidence clearly within the power of a party creates a strong presumption that, if produced, it would be against him." *Miller v. Jones*, 32 Ark. 337 (1877).

"In equity, as at law, the omission of a party to testify in control or explanation of testimony given by others in his presence is a proper subject of consideration." *McDonough v. O'Niel*, 113 Mass. 92 (1873); *Eckel v. Eckel*, 49 N. J. Eq. 587 (1892); *Hall v. Vanderpool*, 156 Pa. St. 152 (1893).

"Where evidence which would properly be part of a case, is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation, he fails to

do so, the jury may draw an inference that it would be unfavourable to him. It is an inference of fact, not a presumption of law." *Hall v. Vanderpool*, (*ubi supra*).

It is competent for the party against whom such presumption would lie to introduce evidence to meet its force. Thus, where it is claimed that the plaintiff, in an action for personal injury, was feigning weakness to escape medical examination into the extent of her injuries, it is competent for her to show that shortly prior she had herself freely invited such examination. *Durgin v. Danville*, 47 Vt. 95, 105 (1874).

But it has been held that (however important as bearing on evenly balanced evidence) the mere failure to question one's own witness as to a certain fact will not relieve the other side of the necessity of proving the fact affirmatively; — if material to his case. "To so hold would be substituting conjecture for proof." *Arbuckle v. Templeton*, 65 Vt. 205 (1892). But where a party offers only weak and unsatisfactory evidence, when he clearly has plenary evidence in his control, such evidence as is offered should "be viewed with suspicion." *Wimer v. Smith*, 22 Oreg. 469 (1892).

In criminal cases, the voluntary suppression of testimony is usually cogent circumstantial evidence of guilt. For example, that a defendant travelled under an assumed name and destroyed, on his arrest, the notes alleged to have been forged, *State v. Chamberlain*, 89 Mo. 129 (1886); or offered to destroy some barrels furnishing incriminating evidence of barratry, *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 307 (1884), do not differ in any essential particulars from other facts circumstantially tending to sustain the claim of criminality.

The same inference or presumption obtains where evidence is fabricated in support of any contention. Indeed, courts have frequently exhibited a perhaps natural resentment and impatience in disposing of such cases and have not always, apparently, felt inclined or constrained calmly to balance the weight of evidence in favor of one who has deliberately attempted to mislead them. But even as matter of logic, an inference or presumption of lack of real merits in a claim or defence which feels forced to rely upon manufactured testimony, presses most strongly on the judgment.

Thus, in an admiralty case of collision, where the defendants produced a log-book found to be false, the court say, "This conclusion disposes of the case; for, in a conflict of evidence such as the case presents, the production of a fabricated log warrants the rejection of the testimony which it is brought to support." *The Tillie*, 7 Benedict, 382 (1874).

Similarly, for a plaintiff to attempt to bribe the sheriff to select certain jurymen "is in the nature of an admission that the cause of the party resorting to bribery of witnesses or jurors is unjust,

and that his claim is dishonest and unrighteous." *Kidd v. Ward*, (Iowa) 59 N. W. 279 (1894).

So in relation to witnesses. "Evidence of the fact of an attempted subornation is admissible as an admission by conduct that the party's cause is an unrighteous one." *Fulkerson v. Murdock*, 53 Mo. App. 151 (1892). So a party may show, if he can, that his opponent has attempted to prevent an adverse witness from attending the trial, and to bribe a witness to testify on his own behalf. *Carpenter v. Willey*, 65 Vt. 168 (1892).

RECENT POSSESSION — The possession of stolen goods shortly after the commission of the crime is presumptive evidence of guilt, or of a receiving with guilty knowledge. "The rule is well established, that the recent exclusive possession of the fruits of crime soon after its commission is *prima facie* evidence of guilty possession." *Henderson v. State*, 70 Ala. 23 (1881).

The supreme court of Illinois has sustained the following ruling: "The jury are instructed, as a matter of law, that possession of stolen property, immediately after the theft, is sufficient to warrant a conviction, unless attending circumstances or other evidence so far overcomes the presumption thus raised as to create a reasonable doubt of prisoner's guilt." *Sahlinger v. People*, 102 Ill. 241 (1882).

It may well be doubted, however, whether the *prima facie* weight of a presumption of law has usually been given this presumption. It seems to be essentially one of fact. "The instruction, that possession of stolen property immediately after the theft, if an unsatisfactory account is given, 'affords presumptive evidence of guilt,' was right; and the whole matter of the degree of force the presumption ought to bear in the particular case was submitted to the jury, as a question of fact, in a manner which leaves no ground for exception." *Com. v. McGorty*, 114 Mass. 299 (1873). "The doctrine of the cases referred to is, that there is no presumption of law arising from the possession of stolen goods. To that doctrine we readily yield our assent. It is not a presumption of law for the court, but a presumption of fact for the jury." *State v. Raymond*, 46 Conn. 345 (1878). The reasons for declining to assign this presumption the probative weight of a presumption of law are principally that the varying circumstances of particular cases, as to remoteness of time, presence or absence of reasonable explanation, etc., give this presumption a very varying weight.

"The first practical difficulty in the way of making it a presumption of law is the impossibility of inventing a rule by which to determine whether the possession is recent or not. . . . It is useless to call such a presumption a presumption of law. Call it what we may, it is a presumption of fact. . . . It is a presumption established by no legal rule, ascertained by no legal test, defined by no legal terms, measured by no legal standard, bounded by no legal

limits. It has none of the characteristics of law." *State v. Hodge*, 50 N. H. 510 (1869).

In *Stokes v. State*, 58 Miss. 677 (1881), a ruling that the present was a presumption of law was held erroneous. "However strongly the one fact may seem to follow from the other, they (the jury) cannot be told they must infer it, or that the law infers it for them."

"Ordinarily it is stronger or weaker in proportion to the period intervening between the stealing and the finding in possession of the accused; and after the lapse of a considerable time before the possession is shown in the accused, the law does not infer his guilt, but leaves the question to the jury under the consideration of all the circumstances." *State v. Rights*, 82 N. C. 675 (1880).

In *Hernandez v. State*, 9 Tex. App. 288 (1880), the court say that the request for an instruction that, "The possession of property recently stolen is a circumstance proper for the consideration of the jury in determining the guilt or innocence of the accused, but does not of itself constitute sufficient evidence to sustain a verdict of guilty," should have been granted. To same effect, *State v. Kimble*, 34 La. Ann. 392 (1882). On the contrary, and with a confused perception of the real relations of presumptions of fact to assumptions of law, the supreme court of Iowa hold that "the presumption in question, unless overcome, will authorise conviction. It is a presumption recognised by the law, and may therefore be termed a presumption of law. The term 'presumption of fact' implies that from certain facts the law will raise a presumption. Either of these terms, 'presumption of law' or 'presumption of fact,' may be used to express the same thought, for they are identical in meaning." *State v. Kelly*, 57 Ia. 644 (1882).

Like other presumptions of fact, proof of the recent possession of stolen goods amounts to circumstantial evidence of a fact in issue. "The fact of the possession of the stolen property by the accused is evidence tending to prove his guilt, but in no sense conclusive as to his guilt; nor does his guilt follow as a presumption of law unless such possession be explained by the accused." *Ingalls v. State*, 48 Wisc. 647 (1879). See also *State v. Raymond*, 46 Conn. 345 (1878).

PRESUMPTION OF CONTINUANCE. — The inference of the existence of a fact at a particular time from proof of its existence at a time previous seems to be entirely one of logic. In other words, it is a presumption of fact. The inference naturally varies much in weight according to the nature of the fact itself and the length of time over which the continuance is sought to be presumed. The presumption has probative force so far as based on experience.

The illustrations of the inference are as endless as the application of any other line of thought.

"If seizin is once proved, it will be presumed to continue until the contrary is shown." *Currier v. Gale*, 9 All. 522 (1865); *Cobleigh v. Young*, 15 N. H. 493 (1844); *Lind v. Lind*, 53 Minn. 48 (1893); *Balch v. Smith*, 4 Wash. 497 (1892).

Evidence being introduced of delivery of bonds to a railroad, and there being no evidence as to what was done with them, the court say: "The only presumption arising from these facts is that said bonds are still in the hands of the railroad company." *Choisser v. People*, 140 Ill. 21 (1892).

Where A. is shown to have owned certain personal property "the law would presume, in the absence of any evidence to the contrary, that it continued to be his up to the time of his death, and that it belonged to the estate at the date of the commencement of this action." *Hanson v. Chiatovich*, 13 Nev. 395 (1878); *Flanders v. Merritt*, 3 Barb. 201 (1848).

But finding a piece of property at a certain place eight months before the death of the deceased is no evidence that it was in the same place at his death. *Adams v. Clark*, 8 Jones (N. C.) L. 56 (1860).

Where one enters into possession of premises as a tenant, he will be presumed to hold under that title, and any intention to claim under a title adverse to the landlord can only be shown by "plain proof." *Leport v. Todd*, 32 N. J. Law, 124 (1866). This presumption has been extended over a period of ten years without evidence in the meantime. *Alabama State Ld. Co. v. Kyle*, 99 Ala. 474 (1892). The fact that A. was insolvent shortly before giving a certain note and mortgage raises "a legal presumption" that he was insolvent at the time issue was joined in a suit on the note. Evidence that he was solvent at the trial of the cause does not countervail the presumption. *Body v. Jewson*, 33 Wise. 402 (1873).

When a person's residence is proved to be in a certain place, it will be presumed to continue until the contrary is shown. "As A.'s residence was admitted to be in the state in 1886, the law presumes that his residence continued to be in this state unless such presumption has been rebutted." *Ferguson v. Wright*, 113 N. C. 537 (1893).

"When the residence of the defendants in New York is once established, it is presumed to continue there till the contrary is shown; and the burden is cast upon the defendants to show a change of residence." *Rixford v. Miller*, 49 Vt. 319 (1877); *Nixon v. Palmer*, 10 Barb. 175 (1850); *Prather v. Palmer*, 4 Ark. 456 (1841); *Wray v. Wray*, 33 Ala. 187 (1858).

The expression last above quoted from the court in *Rixford v. Miller* is significant. The presumption of continuance, like many others, is often made useful by the courts in determining who has the burden of evidence as to a particular fact. In determining this,

jurisprudence plays a part as well as logic, and the presumption of fact being ruled in the language of a presumption of law as a *prima facie* case is *pro hac vice*, given the force of a presumption of law.

INSANITY AND OTHER MENTAL STATES. — A state of settled permanent insanity once shown to exist will be presumed to continue.

"The rule does not apply to cases of occasional or intermittent insanity; but it does to all cases of habitual or apparently confirmed insanity, of whatever nature." *State v. Wilner*, 40 Wisc. 304 (1876); *Lilly v. Waggoner*, 27 Ill. 395 (1862).

"When it appears in proof that a person was, at any given time, of unsound mind (unless from some temporary or transient cause), the legal presumption is, that that state of mind continues until the contrary is made to appear by evidence." *Crouse v. Holman*, 19 Ind. 30 (1862).

If a certain state of relations is shown to exist between two persons it will be presumed to continue. *Eames v. Eames*, 41 N. H. 177 (1860).

So of improper sexual relations. *Caujolle v. Ferrié*, 23 N. Y. 90 (1861).

Evidence that certain persons were partners two or three years before raises a presumption that they are still partners. *Cooper v. Dedrick*, 22 Barb. 516 (1856).

So if a course of dealing, *e. g.*, taking by an insurance company of a promissory note secured by a pledge of the policy in payment of the premiums on a life insurance policy, is once shown to exist, it will be presumed to continue. *Hastings v. Brooklyn Life Ins. Co.*, 138 N. Y. 473 (1893).

But where a former marriage would render a second one bigamous, it will not be presumed to continue on proof that it once existed. "That a fact continuous in its nature, will be presumed to continue after its existence is once shown, is a presumption which ought not to be allowed to overthrow another presumption of equal if not greater force, in favor of innocence." *Klein v. Lawdman*, 29 Mo. 259 (1860).

The real meaning of this apparently is that a presumption is not proof beyond reasonable doubt as is required in criminal cases.

PRESUMPTIONS AS TO LIFE. — The presumption of the continuance of life may be and frequently is of but slight probative force. Its logical effect apparently varies greatly not only with the interval of time which it is sought to cover with the presumption, but also with the probability of procuring evidence other than the presumption if the fact be as claimed. While the presumption of the continuance of life certainly continues during the period of seven years from the time the person was last known to be alive, the presumption of fact may and usually does gradually grow less and

less strong;—until it finally remains merely a forensic presumption or assumption of law; in other words, amounts to a ruling as to the burden of proof;—that he who asserts the death of a person shown to be alive before seven years of unexplained absence has intervened must introduce evidence to show it. “The presumption of the continuance of life is merely a presumption of fact, which is subject to be controlled by facts and circumstances and other legitimate evidence. . . . It is a presumption by no means of equal strength at all times and under all circumstances. If the last known of a person was that he was a soldier, and was about entering into a battle, and had been seen by none of his comrades after the battle, the presumption of the continuance of life would be very slight, and very slight evidence would be sufficient to control it.” *Hyde Park v. Canton*, 130 Mass. 505 (1881). “The evidence, therefore, that a person was living at a particular time is but one of the facts to be considered in the determination of the question whether he is living at any future given time.” *Ibid.*

So if a person be once shown to be alive, he will be presumed to continue to live, within reasonable limits, until the contrary is shown. *State v. Plym*, 43 Minn. 385 (1890). “Ordinarily, in the absence of evidence to the contrary, the continuance of the life of an individual, to the common age of man, will be assumed by presumption of law. The burden of proof lies upon the party alleging the death of the person.” *Stevens v. McNamara*, 36 Me. 176 (1853).

“The rule is, that the proof of the death of a person, known to be once living, is incumbent upon the party who asserts his death; for it is presumed he lives until the contrary be proved.” *Duke of Cumberland v. Graves*, 9 Barb. 595 (1850).

Extreme age alone is not sufficient to rebut the presumption of the continuance of life. “The civil law will presume a person living at a hundred years of age, and the common law does not stop much short of this.” *Watson v. Tindal*, 24 Ga. 494 (1858). So the fact that a person in “bad health” twenty-two years before, would now, if alive, be eighty years old, raises no presumption of death. *Matter of Hall’s Deposition*, 1 Wall. Jr. 85 (1843).

PRESUMPTION OF DEATH.—This apparently is not the entire truth in the matter. As the unexplained absence grows in duration, even during the seven years, and as the inference that the person in question is alive because he has been shown to be at a previous time, therefore continuously grows weaker, a presumption of fact that he is dead has been gaining probative force. As both processes are continuous, a time comes in any case when the probative weight of the second presumption of fact not only preponderates over that of the first, but preponderates to such an extent as to constitute a *prima facie* case in favour of death. The burden of introducing evi-

dence to prove the existence of life under these circumstances lies on him who asserts it;—in other words, there is a presumption of law that the person is dead. This period the law, somewhat arbitrarily but upon reasons historically satisfactory (see Stat. 1 Jac. 1, Ch. 11, sec. 2; 19 Car. 2, Ch. 6), has fixed at seven years. *Johnson v. Merithew*, 80 Me. 111 (1888); *Whiting v. Nicholl*, 46 Ill. 230 (1867); *Adams v. Jones*, 39 Ga. 479 (1869); *Winship v. Conner*, 42 N. H. 341 (1861); *Primm v. Stewart*, 7 Tex. 178 (1851); *Spencer v. Roper*, 13 Ired. 333 (1852); *Youngs v. Heffner*, 36 Oh. St. 232 (1880); *Giles v. Morrow*, 1 Ont. Rep. 527 (1882); *Osborne v. Allen*, 26 N. J. L. 388 (1857); *Burr v. Sim*, 4 Whart. 150 (1838); *Learned v. Corley*, 43 Miss. 687, 709 (1871); *State v. Henke*, 58 Ia. 457 (1882); *Holmes v. Johnson*, 42 Pa. St. 159 (1862); *Garwood v. Hastings*, 38 Cal. 216 (1869).

“When a person goes abroad and has not been heard of for a long time, the presumption of the continuance of life ceases at the expiration of seven years from the period when he was last heard of. And the same rule holds, generally, with respect to persons away from their usual place of resort, and of whom no account can be given.” *Whiting v. Nicholl*, 46 Ill. 230 (1867).

It is error to exclude evidence of persons who have heard of the alleged deceased on the ground that it is hearsay. It rebuts the presumption, which only arises when a person is not heard from in seven years. *Dowd v. Watson*, 105 N. C. 476 (1890).

“The presumption of death, from any lapse of time which the evidence in the case would justify, would only apply where the individual alleged to be dead had left the place of his domicile and had not been heard from for seven years or more.” *Duke of Cumberland v. Graves*, 9 Barb. 595 (1850).

“The statutory presumption, in certain cases, of death after seven years affords no ground for the converse proposition that, if the person has been heard from within seven years, there is a presumption of law that he is still living. Neither is it true that there is any presumption of law one way or the other as to the continuance of life. It is a mere presumption of fact which is subject to be controlled by facts and circumstances, and consequently by no means of equal strength at all times, and under all circumstances; or, perhaps, more correctly speaking, there is no rigid presumption one way or the other.” *State v. Plym*, 43 Minn. 385 (1890).

If the contention that great length of absence tends rather to show that the person in question has changed his home than that he is dead, the court say, “We do not perceive any solid foundation for it.” *Winship v. Conner*, 42 N. H. 341 (1861). But the court of Alabama very truly say that “considering the great length and breadth of this country, and the migratory character of the people, the presumption has less force here than in the country where the

law on this subject originated." *Smith v. Smith*, 49 Ala. 156 (1873).

Where heirs at law, while very young, moved to a western state as a place of permanent residence, evidence that for twelve years they had not been heard of by the testatrix at the place of their original residence, does not raise a presumption of their death. "The absence, without being heard from for seven years, which will warrant the presumption that a person is dead, means absence from that person's place of residence — his home — with which place he would most certainly keep up some kind of communication, or to which he would return were he alive." *Keller v. Stuck*, 4 Redf. 294 (1880).

The death of such person at any time within the seven years is not presumed, but must be proved. *Newman v. Jenkins*, 10 Pick. 515 (1830); *Whiting v. Nicholl*, 46 Ill. 230 (1867); *Spencer v. Roper*, 13 Ired. 333 (1852); *Johnson v. Merithew*, 80 Me. 111 (1888). Such "death may be proved by showing facts from which a reasonable inference would lead to that conclusion, as by proving that a person sailed in a particular vessel for a particular voyage, and that neither vessel nor any person on board had been heard of for a length of time sufficient for information to be received from that part of the globe where the vessel might be driven or the persons on board of her might be carried." *Johnson v. Merithew* (*ubi supra*). So that "the person was dangerously ill, or in a weak state of health, was exposed to great perils of disease or accident, or that he embarked on board of a vessel which has not since been heard from, though the length of the usual voyage has long since elapsed." *Eagle v. Emmet*, 4 Bradf. 117 (1856); *Smith v. Knowlton*, 11 N. H. 191 (1840).

"Any facts or circumstances relating to the character, habits, condition, affections, attachments, prosperity, and objects in life which usually control the conduct of men and are the motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration of such absence." *Tisdale v. Connecticut, &c., Ins. Co.*, 26 Ia. 170 (1868).

"It may well be conceded that where a person is studious in his habits, attentive to his business, has a fixed and permanent residence, and is surrounded by those influences which are calculated to endear him to his home, suddenly and unaccountably disappears, a presumption may arise which would warrant a jury in finding that he was dead." *Hancock v. American, &c., Ins. Co.*, 62 Mo. 26 (1876).

"A jury may find the fact of death, if the circumstances of the case concur, from the lapse of a shorter period than seven years." *Puckett v. State*, 1 Sneed, 355 (1853). So in a case where deceased

was last seen on an overland journey to California, through a country infested with hostile Indians, and determined to fight his way through, the court presume from the fact that neither he nor any of the party were since seen that he died soon after he was last seen. *Davie v. Briggs*, 97 U. S. 628 (1878).

Whoever claims that death occurred at any period within the seven years has the onus of proving that fact. *Doe d. Hagerman v. Strong*, 4 Q. B. U. C. 510 (1848), confirmed 8 Q. B. U. C. 291 (1851); *Howard v. State*, 75 Ala. 27 (1883).

NO PRESUMPTION OF DEATH WITHIN THE SEVEN YEARS. — The attempt has been made to establish a presumption of law that the person died precisely at the end of the seven years, *i. e.*, lived through that period. The better opinion seems to be that the time of death within the prescribed period of seven years is a matter entirely for evidence, and that the person to whose contention the fact of such death is essential, must prove it. "It certainly has not been expressly decided that the person must be taken to have lived throughout the period; but that conclusion inevitably follows from the legal presumption of life, which, though prospectively rebutted at a particular period, is sufficient to sustain the allegation of existence during the time it lasted." *Burr v. Sim*, 4 Whart. 150, 171 (1838). "The legal presumption . . . establishes not only the fact of death, but also the time at which the person shall first be accounted dead." *Whiting v. Nicholl*, 46 Ill., 230 (1867); *Eagle v. Emmet*, 4 Bradf. 117 (1856); *Whiteley v. Equitable Life, &c., Co.*, 72 Wisc. 170 (1888). "It is no answer to say that the probabilities are that the death did not occur at the expiration of the seven years, but at some other time within that period. The time of the death, as well as the fact of death, are presumptions not of fact but of law. The law regards neither as certain. It simply declares that the party shall be presumed to be dead at the expiration of seven years, whenever his death shall come in question." *Clarke v. Canfield*, 15 N. J. Eq. 119 (1862); *Shown v. McMackin*, 9 Lea, 601, 607 (1882); *Stevens v. McNamara*, 36 Me. 176 (1853); *Crawford v. Elliott*, 1 Houst. 465 (1856); *Montgomery v. Bevans*, 1 Sawy. C. Ct. 653 (1871).

If a person was unmarried when last heard from, it will be presumed that he died without issue. *Shown v. McMackin*, 9 Lea, 601 (1882).

WHOSE IGNORANCE IS IMPORTANT. — In an Alabama case it is very truly said that "evidence of parties having no particular interest in the person whose life or death is in issue, not being relations, friends, or members of the family, — parties with whom the absent person, if alive, would not be likely to have any correspondence; . . . should have but little weight." The court held a single letter from the alleged deceased from Texas to one of her friends

four years before of much greater weight than many affidavits from persons who would not naturally be expected to hear from the person, if alive. *Smith v. Smith*, 49 Ala. 156 (1873).

No presumption of death is raised by the fact that inquiries at the post-office of the party's former residence reveal the fact that he is not known there;—even if the person were in “bad health” twenty-two years ago; that if now alive he would be eighty years old, and that his name is not in the directory;—in the absence of evidence of inquiry being made among his friends, the kind of ill health, and the fact of change of residence. “Show me that (alleged deceased) was the subject of some quick consuming disease, or of any specific malady, and you will change the case. . . . It is no presumption of law that the runners of the post-office know, so as to answer at first inquiry, the name and residence of every person in a populous city.” *Hall's Deposition*, 1 Wall. Jr., 85, 104 (1843).

“There is no rule of law which confines such intelligence to any particular class of persons. It is not a question of pedigree.” *Flynn v. Coffee*, 12 All. 133 (1866).

So where a wife left the place where the parties had resided as husband and wife, her evidence that she had not heard of her husband for seven years does not raise the presumption of his death. The persons whose not hearing is significant of the death of persons not heard from are “those who are nearly related to them, or were upon terms of friendship with them, and remained at or near the place where they last resided.” *Thomas v. Thomas*, 16 Neb. 553 (1884); *Com. v. Thompson*, 11 All. 23 (1865). To the same effect is *Hyde Park v. Canton*, 130 Mass. 505 (1881). Under similar facts, and answering the question as to whether the former, abandoning, husband, were dead, the court say: “This is a pure question of fact; and, in the absence of any direct evidence, is to be determined by the presumption which the law authorises. If a man leaves his home and goes into parts unknown, and remains unheard from for the space of seven years, the law authorises to those that remain, the presumption of fact that he is dead; but it does not authorise him to presume therefore that any one of those remaining in the place which he left has died.” *Hyde Park v. Canton* (*ubi supra*). To same effect, of an absence of seventeen years under similar circumstances, see *Garwood v. Hastings*, 38 Cal. 216 (1889). The fact that one has been absent twenty years from a certain place raises no presumption of death, “as there is no evidence he ever established his residence there.” *Stinchfield v. Emerson*, 52 Me. 465 (1864).

It is unnecessary to say that the presumption may be rebutted. *Youngs v. Heffner*, 36 Oh. St. 232 (1880). “This is merely a presumption of fact, and may be rebutted.” *Flynn v. Coffee*, 12 All.

133 (1866). The explanations of such absence may be such as to deprive the presumption of much of its probative force.

Where a person leaves home for some foreign place, unexplained absence for seven years does not raise a presumption of death unless inquiry were "made at such place without getting tidings of him." *Wentworth v. Wentworth*, 71 Me. 72 (1880); *McCartee v. Camel*, 1 Barb. (N. Y.) Chan. 455 (1846).

It naturally follows that if the presumption of death from seven years' absence turns out to be erroneous, that acts done on the strength of the presumption are of no legal validity. For example, a savings bank may be required to pay to a depositor money already paid to his administrator, erroneously appointed on the presumption of his death from seven years' absence. *Jockumsen v. Suffolk Savings Bk.*, 3 All. 87 (1861). For a New York decision, by a divided court, to the contrary effect, see *Roderigas v. East River Savings Instn.*, 63 N. Y. 460 (1875).

PRESUMPTION OF LIFE IN CRIMINAL CASES. — The presumption of the continuance of life, being at the highest a presumption of law, regulating the burden of proof and based upon a presumption of fact of a varying probative force, which grows weaker in exact proportion as it becomes necessary to rely on it, is not considered sufficient to sustain the government's burden of proof in a criminal case on a material point. In other words, it is not proof beyond a reasonable doubt. To adopt a common expression, "The presumption of life yields when in conflict with the presumption of innocence." "Though the law presumes a continuance of life, yet where this presumption necessarily involves a presumption of crime, and comes in conflict with the presumption of innocence, the former, which is the weaker, yields to the latter presumption, and the party affirming that an individual is not dead will be bound to prove it." *Lockhart v. White*, 18 Tex. 102 (1856). For these reasons, on an indictment for bigamy, the courts have usually refused to consider the fact that the defendant's first husband or wife was alive shortly before the second marriage as sufficient evidence that such husband or wife was actually alive at the time of the second marriage. *Squire v. State*, 46 Ind. 467 (1874).

On an indictment for bigamy, the supreme court of Indiana decline to consider the fact that the first wife was alive two years before the second marriage sufficient evidence that she was alive at that time. "Inasmuch as the state was required to prove the appellant's guilt beyond 'a reasonable doubt, we think the jury were not justified in coming to the conclusion, over the presumption of his innocence, that the first wife was living at the time of the second marriage." *Squire v. State*, 46 Ind. 459 (1874). The same rule is applied in a civil case where the continuance of life would establish bigamy in a criminal case. *Sharp v. Johnson*, 22 Ark. 79 (1860);

Klein v. Laudman, 29 Mo. 259 (1860); *West v. State*, 1 Wisc. 209 (1853). "Though the law presumes a continuance of life, yet where this presumption necessarily involves a presumption of crime, and comes in conflict with the presumption of innocence, the former, which is weaker, yields to the latter presumption, and the party affirming that an individual is not dead will be bound to prove it." *Lockhart v. White*, 18 Tex. 102 (1856). "Otherwise the second marriage would be held criminal, by reason of a presumption; which would be to establish a crime upon a bare presumption." *Spears v. Burton*, 31 Miss. 547 (1856).

While "it may be true that innocence is to be presumed, and that when the presumption of life is brought in conflict with the presumption of innocence, the latter should prevail," the jury are not to presume death except at the end of seven years, but are to weigh all the evidence in the case. *Murray v. Murray*, 6 Oreg. 17 (1876).

The rule, more or less definitely announced in the above cases, that the presumption of the continuance of life cannot be used to prove the defendant guilty of bigamy was considered in an interesting Massachusetts case. *Com. v. McGrath*, 140 Mass. 296 (1885). The indictment was for polygamy. For the lawful marriage the government relied on a marriage to one N. W. on January 24, 1880. The defendant set up that previously, in 1876, he had married one C. T. and cohabited with her until within a month of his going through the ceremony with the said N. W. He then asked the court to rule that "the presumption of law in the absence of evidence to the contrary" was that C. T. was alive at the date of the ceremony relied on by the government as the legal marriage. This the judge, on the strength of the presumption of innocence, declined to do. Held error. "The fact that a person is alive at a certain time does afford some presumption that he is alive a month later, as it does that he was alive an hour or a year later. It is evidence tending to prove that fact, which in ordinary cases, in the absence of other evidence, would be deemed conclusive. Its weight, of course, would be affected by any circumstances affecting the probability of the continuance of life in particular cases, or rendering it probable that death had occurred; and, in this case, the fact of the defendant's marriage is such a circumstance. But the question whether a person is alive at a certain time, whether a day, or a month, or a year, or any period less than seven years, after direct evidence that he was living, is for the jury, to be determined by the general presumption or probability of the continuance of life, modified by the circumstances of the particular case. . . . The jury were to judge of the strength of the presumption of the innocence of the defendant, as well as of the continuance of the life of his former wife, in view of all the circumstances affecting them. The instruc-

tions of the court were not merely that there was no presumption of law, and that the fact was for the jury to find upon the evidence, but were in effect a ruling that the presumption of innocence destroyed the presumption of the continuance of life, so that the fact that the first wife was alive a month before the second marriage was not to be considered as evidence that she was living at the time of that marriage."

In a libel for adultery on account of a second marriage, the first being denied, it was held that the general rule that marriage could be inferred from cohabitation did not apply, and an actual marriage must be proved. "We cannot indulge this inference without presuming that the defendant has been guilty of the crime of bigamy." *Case v. Case*, 17 Cal. 598 (1861).

For analogous reasons, when the crime of bigamy is collaterally involved, the continuance of life will not be presumed, *e. g.*, in an action of ejectment where the claim is made that certain heirs of the patentee were illegitimate because a former wife was shown to be living within five years of his marriage to their mother. *Sharp v. Johnson*, 22 Ark. 79 (1860).

PRESUMPTION OF CONTINUANCE AFFIRMED. — But this contention that where, in a civil case, the presumption of the continuance of life tends to show a subsequent marriage to be bigamous, the presumption of innocence requires that probative force should be denied the presumption of continuance of life, has been vigorously repudiated. In a case involving a pauper settlement acquired by a second marriage and residence in the defendant town, the defence being that of a prior marriage to a man who had abandoned the pauper several years before and not shown to be dead, the court say: "It is said, however, in argument, that there is a presumption of innocence, which of itself is sufficient to overcome the presumption of continuance of life; and that therefore the fact that the pauper married again is to be considered as some evidence that she might lawfully do so. The presumption of innocence is not based upon facts, but is independent of all evidence. The presumption of continued life rests upon facts proved; and those established facts, while they raise the presumption of continued life, rebut the presumption of innocence." *Hyde Park v. Canton*, 130 Mass. 505 (1881).

Under similar circumstances, the supreme court of Oregon say: "Ordinarily the death of a person would not be presumed until after an absence of seven years without being heard from. But if within the seven years, the presumption of life is to be overcome by the presumption of innocence, then the entire case and circumstances under which a party claims such force for this presumption of innocence ought to be carefully considered." *Murray v. Murray*, 6 Oreg. 17 (1876).

For similar reasons, the court will not allow a statute permitting persons to marry after three years' unexplained absence by a former husband or wife without being deemed guilty of bigamy to be used as proof of actual death in a criminal case where such death is a material fact. *State v. Henke*, 58 Ia. 457 (1882).

But in a Minnesota case, on an indictment where, however, there were corroborating circumstances, the first wife being shown to be alive within two years of the second marriage, the court sustain a ruling that "when life is once shown, it is presumed to continue until it is shown to have ended. That presumption may be stronger or weaker according to the circumstances of any particular case. It is not a conclusive presumption, but it is a presumption which the jury is warranted in drawing, from the fact of life being shown, that life continues until it otherwise appears." The court state their opinion thus: "Taken as a whole, we find no error in this statement of the law. There is some confusion, if not conflict, of views in the decisions in cases of conflicting presumptions of the continuance of life and of innocence as to which shall prevail. Some hold that what is called the presumption of the continuance of life must yield to the stronger presumption of innocence; and therefore, in prosecutions for bigamy, the fact that the former husband or wife was living at some particular date before the second marriage will not warrant a conviction; that there must be some direct evidence that he or she was still living at the date of the second marriage. Reduced to its logical result, the effect of this would be that, if it was proved by the most indisputable evidence that the former husband or wife was alive and in good health a few hours before the second marriage, the jury could not presume that death had not intervened, without some direct evidence to the contrary. The unreasonableness of this as a practical rule of evidence would seem almost self-evident." *State v. Plym*, 43 Minn. 385 (1890); *Howard v. State*, 75 Ala. 27 (1883).

Probably the "confusion, if not conflict," referred to in *State v. Plym*, 43 Minn. 385 (1890), in part, at least, arises from a failure to distinguish presumptions of fact from assumptions or presumptions of law. In a criminal cause, the forensic rule of the "presumption of innocence" may fairly be considered to be inconsistent with the establishment of a conflicting rule of presumption that there is such a probative force in the presumption of fact of a continuance of life as to satisfy the burden of establishing prescribed by the "presumption of innocence." But there seems no reason why the presumption of continuance should not be used as an inference of fact with such weight as the jury see fit to give it.

SURVIVORSHIP. — A mass of ingenious reasoning clusters about the question, What presumption of survivorship exists when several persons perish in a common accident? The rugged common-sense

of English law, after some slight attempts to adopt them, discards the intricate presumptions of the civil law, as based on age, health, sex, &c., and adopts the rule that there is no presumption on the subject whatever; that he who relies on the fact of survivorship must establish it as best he can. *Newell v. Nichols*, 12 Hun, 604 (1878); *Newell v. Nichols*, 75 N. Y. 78 (1878); *Stinde v. Ridgway*, 55 How. Prac. 301 (1878); *Stinde v. Goodrich*, 3 Redf. 87 (1877).

So in charging a jury, in such a case, Mr. Justice Woods says: "There are no presumptions of law in the case. If the evidence produced by the plaintiffs establishes the fact of survivorship to the satisfaction of your minds, your verdict should be for the plaintiff. . . . The plaintiffs have the affirmative of the issue, the burden of proof is on them, and unless the testimony in the case satisfies and convinces your minds you cannot return a verdict in their favor; but, if you are satisfied and convinced, you can and should." *Robinson v. Gallier*, 2 Woods, 178 (1875).

It is merely reversing the statement, without affecting the meaning, to say, as is frequently done, that the parties are presumed to have perished at the same moment. What is meant is, that he who desires to establish any survivorship, has the burden of proving it. There is no probative force in the "presumption" of simultaneous death, and if that fact were material, affirmative evidence would be required to prove it.

"When two persons, husband and wife, are killed in the same accident, and there is no proof on the subject, the presumption of law is that they died co-instantaneously." *Kansas Pac. R. v. Miller*, 2 Col. 442 (1874).

Apparently the facts that the accident was at sea; that the husband was in the prime of life and an expert swimmer, while the wife was in feeble health, does not authorise an inference that the husband survived. *Fuller v. Linzee*, 135 Mass. 468 (1883).

But, on the contrary, in weighing the effect of positive testimony, the tribunal may properly take into consideration the physical condition of the parties. For example, where a father was washed overboard from a wrecked vessel, a son for a time remaining, evidence of the health of the father may found an inference of the point of time at which the father died. "As we understand the doctrine of the common law, it is this, that when several individuals perish by a common calamity, and there is no circumstance other than that of age, sex, &c., from which it may be rationally inferred who was the longer liver, in such case, no presumption arises upon which a conclusion can be predicated. But that when the calamity, though common to all, consists of a series of successive events, separated from each other in point of time and character, and each likely to produce death upon the several victims according to the

degree of exposure to it, in such a case, the difference of age, sex and health becomes a matter of *evidence* and may be relied upon as such." *Smith v. Croom*, 7 Fla. 81, 144 (1857). To the same effect is *Pell v. Ball*, 1 Cheves (S. C.) Eq. 99, 108 (1840), where the fact that the wife was heard for some time loudly calling for her husband in all parts of the vessel, without reply, was held sufficient evidence to warrant the finding of her survivorship. "Because the plaintiffs are to prove the fact of survivorship, it does not follow that they are to prove it to demonstration." *Ibid.* So where an elderly lady was swept away by a wave, while her grandchildren were seen standing in the place "some ten or fifteen minutes after the grandmother disappeared," it was held that "it may be that the evidence is sufficient to justify the conclusion that the children survived their grandmother as they were last seen alive." *Stinde v. Ridgway*, 55 How. Prac. 301 (1878). This decision, however, was reversed in *Matter of Ridgway*, 4 Redf. 226 (1880), where the surrogate says, after remarking that in such a calamity those who abandon the vessel are the safer: "The facts of this case seem to me to indicate the instant and inevitable doom of the children, with hope of rescue or at least some continuance of life on the part of the grandmother. At all events, I am of the opinion that the parties alleging survivorship have not satisfactorily proved the fact." *Ibid.*

Where the conditions of a common death, *e. g.*, that caused by a burning building, can be made the subject of evidence, all the circumstances of the case are relevant of the question of survivorship. "The death of the several victims resulted from a succession of causes." *Will of Ehle*, 73 Wisc. 445 (1889).

PRESUMPTION OF REGULARITY. — In most instances, this so-called presumption is rather a rule of administration than one of logic. It generally has slight probative force, and amounts in many instances to a statement that whoever relies on an irregularity must prove it. In other words, it states who has the burden of introducing evidence on that particular subject. As the effect of the courts announcing an assumption or "presumption" of law is to shift this burden of introducing evidence, the process of locating the burden of introducing evidence on a particular point by ruling that there is a presumption of law to the contrary has proved an easy one. The practical considerations which have led courts to assume the regularity of proceedings (especially those of long standing) until the contrary is shown are obvious and valuable. It is fair to say of these assumptions, as Sir William Grant, in *Hillary v. Waller*, 12 Vesey, Jr., 239, 252 (1806), said, in presuming a lost grant of the estate, that these "Presumptions do not always proceed on a belief that the thing presumed has actually taken place. Grants are frequently presumed, as Lord Mansfield says (*Eldridge v. Knott*, 1 Cowp. 214 (1774)), merely for the purpose, and from a principle of

quieting the possession. There is as much occasion for presuming conveyances of legal estates; as otherwise titles must forever remain imperfect, and in many respects unavailable, when from length of time it has become impossible to discover in whom the legal estate (if outstanding) is actually vested." This statement is cited with approval in *Fletcher v. Fuller*, 120 U. S. 534 (1886).

JUDICIAL PROCEEDINGS. — Whoever would impeach the accuracy of judicial proceedings must introduce evidence to that effect. The reason is partly given by the supreme court of Pennsylvania: —

"We are not to expect too much from records of judicial proceedings. They are memorials of the judgments and decrees of the judges, and contain a general but not a particular detail of all that occurs before them. . . . Much must be left to intendment and presumption, for it is often less difficult to do things correctly than to describe them correctly." *Beale v. Com.*, 25 Pa. St. 11 (1855); *State v. Lewis*, 22 N. J. L. 564 (1849); *Worley Adm. v. Hineman*, 6 Ind. App. 240 (1892).

"It is a principle long since settled, that in pleading the judgment or decree of a court having plenary jurisdiction of the subject, it is not necessary to set forth the proceedings preliminary to such judgment or decree. The presumption of law is conclusive, that all the requisite prior proceedings were had in the case until the contrary appears." *Lathrop v. Stuart*, 5 McLean, 167 (1850).

So the Maryland court of appeals, in a case involving the validity of a license issued to a Pennsylvania corporation by the governor of Pennsylvania under an act of the legislature of that state, hold that they are required by comity "to presume, that the license granted by the governor, purporting to be in pursuance of the law, was a regular exercise of power, and further to presume from it, that the patent had duly and regularly preceded it." *Plank Road Co. v. Bruce*, 6 Md. 457 (1854).

But the proceedings must be *prima facie* regular.

The courts of Massachusetts, for example, will not assume, in the absence of a recital in the record or evidence to that effect, that a California court had jurisdiction to grant a valid divorce between non-resident parties. "A presumption may exist in favor of the jurisdiction of a court of record of another state, which has assumed to exercise jurisdiction over a subject matter in controversy between parties residing there. But there is no such presumption in favor of the jurisdiction of such a court over parties not there residing." *Com. v. Blood*, 97 Mass. 538 (1867).

OMNIA RITE ACTA. — So it will be assumed, after a suitable length of time, that all facts existed necessary to the validity of an ancient title. The rule proceeds partly upon the presumption of fact that if serious flaws had in reality existed, advantage would have been taken of them in so long an interval, and partly upon consideration

of the practical advantages of quieting titles as contrasted with the mischief and hardship of requiring the proof of trivial things in cases where the evidence is perishable, and, after an interval of time which would render the furnishing of absolute proof extremely difficult and expensive, if not indeed impossible. "There is a time when the rules of evidence must be relaxed. We cannot summon witnesses from the grave, rake memory from its ashes, or give freshness and vigour to the dull and torpid brain." *Richards v. Elwell*, 48 Pa. St. 361 (1864).

So in a case in Maine, where the question turned on the validity of a tax-deed over thirty years old, it is said that "after the lapse of thirty years from a collector's sale of land for taxes, it may be presumed from facts and circumstances proved, that the tax-bills, valuation, warrants, notices, &c., were regular; that the assessors and collector were duly chosen at legal meetings; that the collector was sworn; that a valuation and copy of the assessment were returned by the assessors to the town-clerk, and that everything which can be thus reasonably and fairly presumed, may have the force and effect of proof." *Freeman v. Thayer*, 33 Me. 76 (1851).

Where the plaintiff's title was based in part on a grant of land by a proprietors' meeting ten years before the bringing of the action, held: "It is but a just assumption as against them (and *a fortiori* against a stranger) that a grant asserted by their records to have been made at a legal meeting, was made by a meeting duly warned and holden, until the contrary appears." *Cobleigh v. Young*, 15 N. H. 493 (1844).

But in a Massachusetts case, where five persons petitioned for a proprietors' meeting under a statute authorising that number to apply to a justice of the peace for the purpose, and nine years after a writ of entry was brought on a title derived through the proceedings of that meeting, it was held that there was no "legal presumption" that all five were in fact proprietors, but that the demandant must establish that fact by competent evidence. *Stevens v. Taft*, 3 Gray, 487 (1855).

In a later case in Maine, the point was raised in 1862 that the bond filed by an administrator who had made sale of certain real estate in 1836 did not appear of record to have been approved in writing by the judge of probate, as required by law. The court say: "When we consider that this was a transaction which occurred more than twenty years ago; that the law required the bond to be approved by the judge before it could be legally filed; that the bond was in fact filed; that the record shows that all the substantial steps were taken required by law, and, so far as the administrator was concerned, with technical accuracy; that the sale was a public one, and that the defendant immediately entered under his deed, and has held undisturbed possession for more than twenty years, the law would

fully authorize the conclusion that all was done which was required to give the defendant a perfect title." *Austin v. Austin*, 50 Me. 74 (1862). In a case in Missouri, where executors had been directed by the probate court to give a deed, and there had been undisturbed possession for over twenty years, the court say: "It may well be presumed that the executors . . . executed . . . a deed . . . in conformity to the order of the probate court." The court further speak of "the liberal presumptions that we would indulge in order to prevent irregularities or imperfections in such transactions from being held fatal." *Williams v. Mitchell*, 112 Mo. 300 (1892). A sheriff's deed, over thirty years old, recited a judgment. The court records being burned, held: "The existence of the judgment and execution recited in the sheriff's deed ought to be presumed." *Giddings v. Day*, 84 Tex. 605 (1892).

In a North Carolina case the court, in deciding that a commissioner appointed to take depositions offered in evidence is presumed qualified until the contrary is shown, use the following language: —

"By the general rules of evidence, certain presumptions are continually made in favour of the regularity of proceedings and the validity of acts. It presumes that every man in his private and official character does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption. Thus it will presume that a man acting in a public office has been rightly appointed; that entries made in public books are rightly made by the proper officer, and like instances abound of these presumptions. *Bank v. Dandridge*, 12 Wheat. 64; " *Gregg v. Mallett*, 111 N. C. 74 (1892).

OTHER INSTANCES. — The same rule, for the same reasons, assumes the propriety of official conduct in matters not of record or in aid of ancient titles.

So the official acts of public officers, within the general scope of their powers, will be presumed to be by legal authority. *Payne v. Treadwell*, 16 Cal. 220 (1860).

Public officers and all other people will be presumed to do their duty, — the idea being that the onus of evidence is on the person alleging the contrary. A county judge, for example, will be presumed to have paid over insurance-money to the county treasurer as required by law. *Staples v. Llano Co.* (Tex. Civ. App.), 28 S. W. 569 (1894). So it will be presumed that a sheriff in giving a deed acted within his legal powers. *Ivy v. Yancey* (Mo. Supreme Court), 31 S. W. 937 (1895). The courts of North Carolina say that there is a presumption that men do their duty, private and official, until the contrary is shown; that all things were rightly done unless the circumstances rebut the presumption; that they will presume men in public office were rightly appointed; that entries in public books

were made by the proper officers. So it will be presumed that a commissioner appointed by the court to take depositions is qualified until the contrary is shown. *Gregg v. Mallett*, 111 N. C. 74 (1892).

Such a presumption, as has been said, usually amounts merely to a statement of the burden of evidence. Its lack of probative force is seen when it is attempted to use it probatively, *i. e.*, to supply proof of such alleged regularity. Such a force the courts have declined to give it. "The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; but it does not supply proof of a substantive fact. . . . Nowhere is the presumption held to be a substitute for proof of an independent and material fact." *U. S. v. Ross*, 92 U. S. 281 (1875).

LOST GRANT. — Analogous to the presumption of regularity in acts of ancient possession is the rule that, in favor of the legality of a long continued enjoyment of corporeal or incorporeal hereditaments, a jury is authorised to infer the previous existence and subsequent loss of such documents as would legally account for the existing user. This "presumption" hardly pretends to be anything more than a judicial fiction. By employing the language of the law of evidence, the idea that judges declare law and do not create it is made to "moult no feather." At first the inference of a lost grant was said by the court to be a justifiable one; *i. e.*, one which the jury might draw if so disposed. Then it is stated as an inference which the court advised. Finally, the rule was laid down broadly that a jury should be instructed not only that they might, but also that they were bound, to presume the existence of such a lost grant, although neither judge nor jury nor any one else had the remotest idea that any such instrument had, in fact, really existed.

INCORPOREAL HEREDITAMENTS. — In case of incorporeal hereditaments, the presumption of a lost grant has been stated as a positive rule. "Adverse, exclusive, and uninterrupted enjoyment for twenty years of an incorporeal hereditament affords a conclusive presumption of a grant or a right, as the case may be, which is to be applied as a *presumptio juris et de jure*, wherever by possibility a right can be acquired in any manner known to the law." *Wallace v. Fletcher*, 30 N. H. 434 (1855).

The rule has even been invoked in favor of the state's power of taxation. Certain Indian lands in the state of New Jersey were, by convention in 1758, exempted from taxation. In 1803, these lands were sold to the predecessors in title of the realtors, who, upon being taxed by the state under a statute of 1804, resisted the attempt to collect the tax, and by a decision of the United States supreme court (*State of New Jersey v. Wilson*, 7 Cranch, 164 (1812)) succeeded in their contention. For some unexplained reason, the pay-

ment of taxes was resumed in 1814 and continued until 1877. Upon their again insisting on an immunity from taxation, it was held by the court in giving judgment affirming the tax, that "the presumption will arise from the payment of the tax for so long a period, that the claim of the citizen has been discharged and extinguished." The fact "raises a conclusive presumption that by some convention with the state the right to exemption was surrendered." *State v. Wright*, 41 N. J. L. 478 (1879). The language of the court as to "conclusive presumptions" sufficiently indicates that the rule laid down is not one based upon logic primarily, but is a rule of positive law.

But in a well-considered case in Pennsylvania, *Carter v. Tinicum Fishing Co.*, 77 Pa. St. 310 (1875), user of a fishery for a long period was held to raise merely a presumption of fact, the weight of which should have been submitted to the jury. "Acts of ownership over incorporeal hereditaments," say the court, "corresponding to the possession of corporeal, are deemed a foundation for a presumption."

CORPOREAL HEREDITAMENTS.—The presumption of a grant of corporeal hereditaments has not usually been placed higher than a presumption of law, while in case of incorporeal hereditaments it has been laid down as a positive rule of law, under the disguise of a presumption of law.

"In cases where the party claiming title under such presumption, may find it necessary to rely upon the presumption of a deed, we think that long continued user is evidence of a lost or non-existing grant, from some person who might, at some time, have made a valid grant to some person capable of accepting it." *Wallace v. Fletcher*, 30 N. H. 434, 452 (1855); *Proprietors of the Church in Brattle Square v. Bullard*, 2 Metc. 363 (1841); *Williams v. Mitchell*, 112 Mo. 300 (1892).

The rule in Massachusetts is stated thus by Chief Justice Shaw: "Such a question is a mixed question of fact and law, to this extent, that the facts being found, it is for the court to advise the jury, whether in their nature and quality they are sufficient to raise the presumption proposed, the weight of the evidence being for the jury." *Valentine v. Piper*, 22 Pick. 85, 94 (1839).

This presumption of a grant "can never fairly arise where all the circumstances are perfectly consistent with the non-existence of a grant; *à fortiori*, they cannot arise where the claim is of such a nature as is at variance with the supposition of a grant." *Ricard v. Williams*, 7 Wheat. 59, 109 (1822).

REGULARITY IN BUSINESS.—In cases involving the operation of an established course of public or private business where precision is a necessary requirement, and systematic accuracy has been demonstrated by experience, it is evident that we have in the so-called

presumption of regularity something more than a statement that the burden of introducing evidence to the contrary rests on him who disputes it. The presumption in such cases is one of fact, the probative force of which is readily recognised, though it may greatly vary, for obvious reasons.

REGULARITY OF MAILS, ETC. — For example, letters received in regular course of business responsive to letters on the same subject, with proper letter-heads, envelopes, etc., are presumably authentic, according to their purport. *Scofield v. Parlin, &c. Co.*, 61 Fed. Rep. 804 (1894).

The postmark of a letter containing a notice of protest of a promissory note "is evidence that the letter was mailed and sent, rather than that it was merely put into the post-office." *New Haven County Bank v. Mitchell*, 15 Conn. 206 (1842); *Oaks v. Weller*, 16 Vt. 63 (1844); *Russell v. Buckley*, 4 R. I. 525 (1857); *U. S. v. Babcock*, 3 Dill. C. Ct. 571 (1876).

The presumption has been placed as high as a presumption of law. "The depositing in the post-office of a letter properly addressed, with the postage prepaid, is *prima facie* evidence that the person to whom it was addressed received it. The fact that the defendants had no additional proof that the letters were actually received by the plaintiff is immaterial. The evidence that letters were so deposited was competent, and should have been submitted to the jury to be weighed by them in connection with the other evidence in the case. They alone have the right to decide whether the inference that the letters were received, founded upon the probability that the officers of the government will do their duty, and that letters will be duly delivered, is overcome by the other evidence." *Briggs v. Hervey*, 130 Mass. 186 (1881); *Folsom v. Cook*, 115 Pa. St. 539 (1887).

Speaking of a notice of dissolution of a partnership, the supreme court of Illinois say: "Proof of the mailing of the circular to them was *prima facie* evidence that they received it. And no rebutting testimony was introduced to overcome the presumption thereby created." *Young v. Clapp*, 147 Ill. 176 (1892).

"It is well settled that the fact of depositing, in the post-office, a properly addressed, prepaid letter, raises a natural presumption, founded in common experience, that it reached its destination by due course of mail. In other words, it is *prima facie* evidence that it was received by the person to whom it was addressed; but that *prima facie* proof may be rebutted by evidence showing that it was not received. The question is necessarily one of fact, solely for the determination of the jury, under all the evidence." *Whitmore v. Dwelling House Ins. Co.*, 148 Pa. St. 405 (1892).

"It was error to instruct the jury that the mailing of a letter addressed to the appellants was notice to them of its contents. It

was presumptive evidence, but nothing more." *Eckerly v. Alcorn*, 62 Miss. 228 (1884); *Hastings v. Brooklyn Life Ins. Co.*, 138 N. Y. 473 (1893).

So the supreme court of Pennsylvania say: "There is no presumption of law that a letter, mailed to one at the place he usually receives his letters, was received by him. A strong probability of its receipt may arise . . . and the fact of its deposit in the mail-bag in connection with other circumstances may be sufficient to warrant the court in referring the question of its receipt to the determination of the jury." *National Bank, &c. v. McManigle*, 69 Pa. St. 156 (1871).

The requirement that the letter be sent to the sendee's permanent address is a reasonable qualification of the rule. *Huntley v. Whittier*, 105 Mass. 391 (1870).

"Such a presumption is in accordance with and is founded upon common experience, and is therefore known to the law as a presumption from the ordinary course of business. Farther proof of the receipt of a letter than what is derived from proof of the proper direction and mailing of it would be wholly unnecessary, always difficult, and often impossible." *Russell v. Buckley*, 4 R. I. 525 (1857).

Other courts have considered the presumption purely one of fact. "The presumption so arising is not a conclusive presumption of law, but a mere inference of fact, founded on the probability that the officers of the government will do their duty, and the usual course of business; and when it is opposed by evidence that the letter was never received, must be weighed, with all the other circumstances of the case, by the jury, in determining the question whether the letter was actually received or not; and the burden of proving its receipt remains throughout upon the party who asserts it." *Huntley v. Whittier*, 105 Mass. 391 (1870), quoted with approval in *Rosenthal v. Walker*, 111 U. S. 185 (1883). "The mailing of a notice properly directed to the party to be charged raises a presumption of notice in fact, for it is presumed that letters sent by post to a party, at his residence, are received by him in due course. But it is a presumption of fact and not of law, and may be repelled by proof." *Austin v. Holland*, 69 N. Y. 571, 576 (1877); *De Jarnette v. McDaniel*, 93 Ala. 215 (1890); *German Nat. Bk. v. Burns*, 12 Col. 539 (1889).

"There is no presumption of law that a letter directed and mailed to one at the place where he usually received his letters was received by him. . . . From its postmark, the fact that a letter was mailed may be inferred; but by that, or other admissible evidence, the mailing, when material, must be proved. It will not be presumed from evidence that it had been written. So as to time of mailing. No presumption whatever arises from the date written

in the letter. . . . The date of a postmark upon a letter is not evidence that it was forwarded on that day. . . . *A fortiori* the date of a letter is not." Uhlman v. Arnholdt, &c. Brewing Co., 53 Fed. Rep. 485 (1893).

There is no presumption of law that a letter postmarked June 12th was not deposited in the post-office until that day. "A letter deposited on the 11th might happen not to be noticed or stamped until the 12th. It was sufficient, on this point, to instruct the jury that the postmark was one of the circumstances to be taken into consideration, with others, in deciding whether the letter was actually left on the 11th, or not till the 12th." Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177 (1869).

Kentucky court of appeals denies the presumption the weight of a presumption of law, but considers it "proper testimony to be considered by the jury, together with the other evidence, in determining when it [the letter mailed] was received; and they should not have been instructed that a presumption arose from it which must prevail, unless overthrown by other satisfactory evidence." Sullivan v. Kuykendall, 82 Ky. 483 (1885).

The presumption does not go so far as to establish the date of the receipt of the letter in the absence of evidence as to the frequency and speed of trains or the "usual course and time of mails." Boon v. State Ins. Co., 37 Minn. 426 (1887).

The mailing must be itself proved. Where the secretary of an insurance company testified that he wrote and signed a certain letter, and gave it to an attendant to press-copy; that the latter brought it back looking as if it had been press-copied; that he folded and enclosed it in a sealed envelope, on which was a notice to return if not delivered; directed it to the insured, and put it in a basket where letters for mailing were usually placed. And the office-porter testified that it was his business to take the letters from the basket and mail them; that he mailed all letters found in the basket, but had no recollection of ever seeing or handling this particular letter, it was *held*, this being the only evidence on the point, that whether the letter was mailed was a question for the jury, and it was not so conclusive as to authorise the court to take the case from the jury. Hastings v. Brooklyn Life Ins. Co., 138 N. Y. 473 (1893).

So no presumption of the receipt of a letter arises in the absence of evidence that it was stamped. Bless v. Jenkins (Mo. Supreme Court), 31 S. W. 938 (1895).

On the same ground of the due performance of official duty rests the presumption that a letter was received by the sendee, if the envelope containing it bore a request for its return to the sender if not delivered in a certain time, and it has not been returned. "Evidence that upon the envelope was printed a request for a return of

the letter to the post-office address of the plaintiff, if not called for in ten days, and that the letter was not returned to him, was rightly admitted in connection with the evidence that the plaintiff sent the bill enclosed in this envelope by mail to the defendant. It was the duty of the officers of the postal service to return the letter to the address upon the envelope (the postage being prepaid) if it was not delivered to the person to whom it was addressed, and there is the same inference of fact that they would do their duty in this respect as in forwarding and delivering letters addressed to a merchant at his place of business." *Hedden v. Roberts*, 134 Mass. 38 (1882). In a recent Pennsylvania case, the court say that the fact of non-return of a letter bearing a request for return in case of non-delivery so strengthens the presumption of receipt from mailing "that it becomes well-nigh conclusive." *Jensen v. McCorkell*, 154 Pa. St. 323 (1893).

But this presumption of the regular performance of official duty may have but small weight in a particular instance especially outside of the routine work of an office, and it may therefore be only a ruling on the burden of evidence, *i. e.*, a pure presumption of law. On the question whether a defendant knew he had no title to timber he had cut, an attempt was made to show that he had been notified by the United States government authorities that his entries had been cancelled. Defendant absolutely denied that he ever had been so notified. To prove notice, evidence was introduced that the Commissioner of the Land-Office had notified the local register that the defendant's entries were cancelled, and directed him so to notify the defendant. The plaintiffs then relied on the presumption that the Register had done as directed. The court say: "They rely upon the familiar rule that all reasonable presumptions must be made in favor of the regularity and validity of the action of public officers and tribunals. This rule is well established, but it does not appear to be applicable under the present circumstances. It is a mere presumption of law, which operates only in case of absence of evidence. It disappears entirely in the presence of positive, uncontradicted evidence upon the subject; and, furthermore, it seems very doubtful whether any presumption could be indulged here that the register gave the notice in question." *Befay v. Wheeler*, 84 Wisc. 135 (1893).

REGULARITY IN TELEGRAMS. — Based on similar reasons, a presumption of fact exists that a telegram properly directed and delivered to the company for transmission is duly received by the person to whom it is sent. But little can be added to the very cogent reasoning adopted by the New York court of appeals on the subject. *Finch, J.*, in *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 451 (1885); *Com. v. Jeffries*, 7 All. 548 (1863); *U. S. v. Babcock*, 3 Dill. C. Ct. 571 (1876); *White v. Flemming*, 20 Nova Scotia, 335 (1888).

PART II.

RULES GOVERNING THE PRODUCTION OF TESTIMONY.



CHAPTER I.

CORRESPONDENCE OF EVIDENCE WITH ALLEGATIONS; SUBSTANCE OF ISSUE; VARIANCE; AND AMENDMENT.

§ 217.¹ THE production of evidence on a trial—whether civil or criminal—is governed by four general rules. *First*, the evidence must correspond with the allegations in the pleadings,² but the substance only of the issues raised thereby need be proved; *secondly*, the evidence must be confined to the points in issue; *thirdly*, the burthen of proving a proposition at issue lies on the party holding the substantial affirmative; and *fourthly*, the best evidence, of which the case in its nature is susceptible, must always be produced.

§ 218.³ The first rule is that the evidence must correspond with the allegations in the pleadings. The pleadings, it may be explained, are the written allegations of the parties, terminating in propositions distinctly affirmed on one side, and denied on the other, called the issues.² If these are propositions of fact, the *first rule*, which it is important to remember, is, that the *evidence must correspond with the allegations, but that it is sufficient if the substance of the issues be proved*. Pleadings being intended⁴ to apprise the parties of the specific questions to be tried, this object would be defeated

¹ Gr. Ev. § 50, slightly.

² See generally as to the nature of pleadings, and the rules by which they are now governed, post, § 298 et seq.

³ Gr. Ev. § 51, in part, as to first six lines.

⁴ As to their objects, see further, post, § 299.

if either party were at liberty to prove facts essentially different from those stated on the record, as constituting the claim or charge on the one hand, or the defence on the other.¹ Every material disagreement, between the allegation and the proof, constitutes what is called a *variance*, which, in strictness, is as fatal to the party on whom the proof lies as a total failure of evidence.

§ 219. Having regard to the recent changes in the law on this subject, it appears to be unnecessary to give detailed instances of what the old law held to be a *variance*.²

§ 220. A partial remedy for the injustice which in old days was done by the highly technical rules which prevailed as to “variances” was provided in 1828;³ larger powers of amendment were granted in 1833 to the English judges,⁴ and in 1840 to the Irish judges.⁵

§ 221. In *civil* cases further powers of amendment were created in 1852, by the Common Law Procedure Act,⁶ and by the Equity Procedure Act of that year;⁷ the Common Law Procedure Acts of 1854 and 1860 contained clauses authorising the amendment of “all defects and errors in any proceedings under the provisions” of those Acts respectively, “if duly applied for;”⁸ while the Irish Common Law Procedure Act of 1853 empowered the judges in that country to amend “all defects and errors in any writ, pleading, record, or other proceeding in civil causes,”⁹ and the law relating

¹ In *Caton v. Caton*, 1849, Dr. Lushington observed: “The maxim of the Eccles. Courts, and I may say of all other courts, is to decide *secundum allegata et probata*. There must be both charge and evidence; the party cited is entitled to know the specific charge for the purpose of defence. * * The difficulty I feel is to avoid the error of adhering to this rule with *pedantic strictness*, and, on the other hand, not to weaken a rule which is founded on one of the great principles of justice.” See *Malcolmson v. Clayton*, 1860, P. C. (Ld. Chelmsford); *The Ann*, 1860, P. C.; *Tyrer v. Henry*, 1860, P. C.; *Kilgour v. Alexander*, 1860, P. C.; *The Haswell*, 1864; and *The Amalia*, 1864.

² *Jones v. Cowley*, 1825, was declared by Alderson, B., to be “a

great disgrace to the English law,” in *Hemming v. Parry*, 1834. See, also, *Goodtitle v. Lammiman*, 1809; *Brooks v. Blanshard*, 1833.

³ By 9 Geo. 4, c. 15 (repealed by 53 & 54 V. c. 33, “The S. L. R. Act, 1890”).

⁴ By 3 & 4 Will. 4, c. 42, §§ 23, 24 (repealed as to High Court by 44 & 45 V. c. 59).

⁵ By 3 & 4 V. c. 105 (“The Debtors (Ireland) Act, 1840”), §§ 48, 49.

⁶ 15 & 16 V. c. 76, §§ 34, 35, 37, 222 (repealed by 46 & 47 V. c. 49). See corresponding sections in the Irish Act of 16 & 17 V. c. 113, §§ 85—91.

⁷ 15 & 16 V. c. 86, §§ 49, 53.

⁸ 17 & 18 V. c. 125, § 96; 23 & 24 V. c. 126, § 36. Repealed by 46 & 47 V. c. 49.

⁹ 16 & 17 V. c. 113, § 231, Ir.

to such amendments was in *civil* cases further altered by the Rules of Court originally framed under the Judicature Acts of 1873 and 1875; and in 1883 these last-named Rules were annulled. The Rules, now regulating the amendment of proceedings in civil cases in the Supreme Court, are Orders XVI., XIX., and XXVIII. of the R. S. C., 1883.¹

§ 222-5. Not one of the above named three Orders, however, has any effect on *criminal* proceedings, or on proceedings for divorce or other matrimonial causes. Orders XVI., and XIX., moreover, are inoperative in proceedings, either on the Crown side, or on the Revenue side, of the Queen's Bench Division. Order XXVIII. however, applies to all *civil* proceedings on the Crown side, including mandamus, prohibition, and quo warranto, and to all proceedings on the Revenue side, of the same Court.² And it will be recollected that the law as to amendment of civil proceedings in many inferior courts, is still governed by the enactments earlier than the Judicature Act which are referred to in § 220.

§ 226. Reference must be made to a Book upon Practice for the details of the contents of the Rules just mentioned, and of the decisions upon them. Briefly, however, their effect may be summarized by saying that, 1st, the court or a judge may at any stage of the proceedings, "for the purpose of determining the real question or issue,"³ allow either party to alter or amend his indorsement or pleadings; ⁴ 2nd, all such amendments shall be made as

¹ Even an indorsement can be amended, see *Cornish v. Hochen*, 1853; *Leigh v. Baker*, 1857. As to amendments of pleadings in the Consistory Court of London, see Reg. Gen. of 1877 relating to that court, Ord. III.

² Crown Office Rules, 1883, r. 299.

³ As to what is "the real matter in controversy," it has been said that it is a matter, not of law, but of fact, what "the real question in controversy between the parties" is; next, that this matter of fact must be determined, not by the jury, but by the judge on a careful consideration of the pleadings and the evidence; and, lastly, that "the question in controversy" is, in other words, the question which both parties really in-

tended to have tried, and not any question which, during the course of the trial, may for the first time be brought into controversy by one of the litigants. See *Roles v. Davis*, 1859 (judgment of Court of Common Pleas). As to amendments of names, or substituting or adding parties, see rr. 11 and 12 of Ord. XVI., under which an application cannot be made *ex parte*: *Tildesley v. Harper*, 1876 (Hall, V.-C.); *S. C. in C. A.*, 1878.

⁴ Where a plaintiff amends his claim so as to alter the whole cause of action, the proper course is to apply to the court to disallow the amendment, or to allow it only on terms: *Bourne v. Coulter*, 1884. See also rr. 1 and 4 of Ord. XVI., which respectively render amendments un-

may be necessary for the purpose of determining the real questions in controversy;¹ 3rd, without leave, but subject to the risk of having to pay costs, the plaintiff may amend his statement of claim, and the defendant may amend his counterclaim or set-off; 4th, the application for leave to amend any pleading may be made by either party to the court or a judge, or to the judge at the trial of the action;² 5th, pleadings may be amended by striking out any scandalous or embarrassing matter; and lastly, any of these respective amendments may be allowed upon such terms as to costs or otherwise as may be just.

§ 227. The powers of amendment conferred by these rules ought to be exercised in a liberal spirit.³

necessary in cases where too many plaintiffs or defendants have been joined. See *Child v. Stenning*, 1877; *Booth v. Briscoe*, 1877.

¹ See n. ³, ante, p. 186.

² An application to amend can only be made where there has been a bona fide mistake: *Clowes v. Hilliard*, 1893 (Jessel, M.R.). But such mistake may be one of law: *Duckett v. Gover*, 1877 (Jessel, M.R.). And the court must be satisfied, where a party is proposed to be added, that he has assented, or that his interests have been properly protected: *Turquand v. Fearon*, 1879. Where, after an amendment, the opposite party fails to plead again, he is taken to rely on his original pleading: *Boddy v. Wall*, 1877. If a party be added (see r. 11 of Ord. XVI. as to this) he must, if he be a plaintiff, have given a written consent, and, if a defendant, be served with a summons or notice. As to when a plaintiff will or will not prejudice the fair trial of the action by asking alternative relief, see *Bagot v. Easton*, 1877, C. A. As to what is embarrassing, see *Heap v. Marris*, 1876; *Davy v. Garrett*, 1877, C. A.; *Stokes v. Grant*, 1878; *Philipps v. Philipps*, 1878, C. A. This last case shows what statements must be contained in an action for the recovery of land of which the plaintiff has never been in possession. A county court judge can amend a misjoinder of defendants in an action remitted from the High Court. See *Rennison*

v. Walker, 1872.

³ This was so even with regard to the power of amendment conferred before the Judicature Acts. See *Parry v. Fairhurst*, 1835 (Alderson, B.); *Sainsbury v. Matthews*, 1838 (Parke, B.); *Ward v. Pearson*, 1839; *Evans v. Fryer*, 1839 (Williams, J.); *Pacific St. Navig. Co. v. Lewis*, 1847 (Pollock, C.B.); *Smith v. Knowelden*, 1841. Lord Mansfield long ago said (*Bristow v. Wright*, 1781): "The strong bias of my mind has always leaned to prevent the manifest justice of a cause from being defeated or delayed by formal slips, which arise from the inadvertence of gentlemen of the profession; because it is *extremely hard on the party to be turned round, and put to expense, from such mistakes of the counsel or attorney he employs*. It is hard, also, on the profession." With reference to amendments under the Judicature Act, Bowen, L.J., said that there was no kind of error or mistake which, if not fraudulent or intended to overreach, a court ought not to correct, if it can be done without injustice to the other party, for courts of justice do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and amendments for this purpose ought not to be regarded as matters of favour or of grace: *Cropper v. Smith*, 1884, C. A. (Bowen, L.J.). In accordance with the spirit of this dictum, the Court of Appeal has held that an amendment on such

§ 228-9. It would, since this is not a book of Practice, not only be irrelevant to give details of the various decisions which have taken place as to amendments, but it would also be of no practical utility; seeing that it is extremely unlikely that a case in which the necessity for amendment arises at *Nisi Prius* will be identical, or nearly so, with any case which has been previously the subject of actual decision.

§ 230. At the same time, it may not be entirely without use to here point out a few instances which exemplify *principles*, in accordance with which an amendment has been permitted to be made even under the old law.¹

§ 231. Where the real questions in dispute were, first, whether land in the possession of a tenant was the plaintiff's property, and, next, whether there was a public footway across it, the plaintiff was allowed to amend the pleadings in such a way as to really raise these questions free from technicalities.² Where the real question was whether cargo had been delivered in proper time, an amendment of the pleadings, by inserting averments that raised this question in proper form, was allowed.³

§ 232. In an action for slander, where the words charged were, "S. is to be tried at the Old Bailey, &c.," and those proved to have been really spoken were, "*I have heard* that S. is to be tried, &c.," an amendment was allowed on payment of costs,⁴ Bosanquet, J., observing that the introduction of the words "*I have heard*" left the slander as actionable as before, although the amount of

terms as the circumstances may demand ought always to be allowed where the other party would not be seriously or irremediably damnified, but no injury would be caused to him which would not be sufficiently compensated for by costs, see *Claparede v. Comm. Union Assurance Co.*, 1893, C. A.; *Tildesley v. Harper*, 1878, C. A.; *In re Trufort, Trafford v. Blanc*, 1885. In *St. Losky v. Green*, 1860, Byles, J., observed, "Various statutes have, from time to time for more than 500 years, been passed, from the 14 Ed. 3, c. 6, downwards, to facilitate amendments, but the strict and almost perverse construction which the judges put upon them, rendered them nearly abortive.

But now a totally different principle prevails. Every amendment is to be made, which is necessary for determining the real question in controversy between the parties."

¹ Those who wish to understand the *very old* doctrine of variance, and to trace its oppressive operation previously to the passing of the remedial statutes, will find the subject fully and ably treated in 1 St. Ev. 430—494. See, also, 1 Ph. Ev. 503 et seq. See, also, the cases cited *supra*, in n. ² to § 219.

² *May v. Footner*, 1855.

³ *Tennyson v. O'Brien*, 1855. See *Savage v. Canning*, 1867 (Ir. C. F.).

⁴ *Smith v. Knowelden*, 1841.

damages might be lessened, and also that, as the damages were given for the words as *proved*, and as the defendant did not apply to amend his pleadings or to put off the trial, it did not appear how he could have been prejudiced in his defence.¹ In another action for slander, where the words alleged to have been spoken about a surgeon were, "There have been many inquests held upon persons who have died, *because* he attended them;" but those proved were, "Several have died that he (plaintiff) has attended, and inquests have been held on them," an amendment was likewise allowed.² Where the only variance was, that the words stated in the declaration were in English, while the expressions proved were Welsh, an amendment was also allowed.³

§ 233. In another action for defamation, on objection being taken that the plaintiff's pleadings did not (as is necessary) set out the libel, but merely stated its substance, an amendment by setting out a verbatim copy of the defendant's letter on the record was allowed.⁴ Where it was alleged that the defendant published a libel, "*contained in and being an article in a certain weekly paper, called the 'Paul Pry,'*" and proved that he had given a slip of printed paper, containing the libellous matter, to several persons to read; but it was not proved that this slip had been cut from any newspaper, the record was amended by striking out the allegation marked in italics without any terms whatever being imposed.⁵ Similarly, a statement by way of justification, that goods had been stolen by "some person unknown," was allowed to be amended by striking these three words out, and substituting the name of the party who was proved to have taken such goods.⁶

§ 234. Where a special contract is stated, and the pleading then contains an *erroneous* allegation in conformity with its *supposed legal effect*, such allegation (even under the old law) might either be struck out, or so altered as to express correctly the real meaning of the contract.⁷

¹ 2 M. & Gr. 565.

² *Southee v. Denny*, 1847.

³ *Jenkins v. Phillips*, 1841 (Cole-ridge, J.).

⁴ *Saunders v. Bates*, 1857.

⁵ *Foster v. Pointer*, 1840 (Gurney, B.). See, also, *Pater v. Baker*, 1847.

⁶ *Pratt v. Hanbury*, 1849. See, also, *West v. Baxendale*, 1850; and *Hailes v. Marks*, 1861.

⁷ *Whitwill v. Scheer*, 1838. But see *Bowers v. Nixon*, 1847, cited post, § 239.

§ 235. An amendment, too, might, under the old law (and *à fortiori* may now) usually be made, where the contract, or tort, or custom declared upon, turns out to be either *more or less comprehensive* than the one proved.¹ For example, the statement of a *general* warranty of a horse has been amended by substituting an allegation of a *qualified* warranty, where the defence did not depend upon the qualification introduced;² and a pleading alleging that defendant promised to lay out certain money in the purchase of a *government annuity*, and averring as a breach that he had not done so, but had placed it in the hands of some private company, has been amended by substituting “security” for “annuity,” where the evidence showed that the money had in fact been received for the purpose of investing it in some *government security*.³

§ 236. Where a contract, a duty, an instrument, or other matter has been *misdescribed* on the record, an amendment to suit the facts proved is permissible, alike under the old law and the present Rules.⁴ For example, where the pleadings stated that the defendants, in consideration of plaintiffs supplying beer to a third party, promised to *pay* them the amount of the beer so supplied, and in support of plaintiff’s claim a written *guarantee* was put in, the “variance” (between an *original* liability to pay, and the *collateral* liability arising on a guarantee) was allowed to be amended by substituting the word “guarantee” for “pay.”⁵ In former editions of this work, numerous further cases were set out, which furnished detailed examples of amendments having been allowed; but, for the reasons already given, it is thought that the insertion of any more detailed instances would be now useless.

§ 237. Even under the old law (and *à fortiori* now) the court could, upon the trial of an issue of nul tiel record,—which, be it remembered, must be determined by the court, and not by a judge and jury,⁶—amend, by inserting in the pleadings, the true date of the judgment alleged to have been recovered.⁷ A defence of “Not

¹ See *Pacific St. Navig. Co. v. Lewis*, 1847.

² *Hemming v. Parry*, 1834 (*Alderson, B.*); *Mash v. Densham*, 1834 (*id.*); *Read v. Dunsmore*, 1840.

³ *Gurford v. Bayley*, 1842. See, also, *Evans v. Fryer*, 1839; *May v. Carmarthen v. Lewis*, 1834.

⁴ *Hanbury v. Ella*, 1834.

⁵ *Parry v. Fairhurst*, 1845.

⁶ *Ante*, § 47; and see *Richardson v. Willis*, 1872.

⁷ *Noble v. Chapman*, 1854. See, also, *Hunter v. Emmanuel*, 1854, where the true amount recovered was inserted in the declaration.

guilty by statute" has been amended by inserting in the margin an Act which had been omitted;¹ and a defence, not *technically* proved by the evidence, was amended at Nisi Prius so as to raise the substantial question, without the imposition of any costs.² A judge has been held³ justified in amending a claim at the trial so as to increase it from 600*l.* to 750*l.*; and in an action against the clerk of a local board of health, an amendment of the proceedings, by substituting the board as defendants instead of the clerk, has been allowed,⁴ and vice versâ amendment has been sanctioned, where the board had sued in the name of their clerk in lieu of their own name.⁵

§ 238. The cases in which amendments were *refused* under the old law furnish no safe guide in interpreting the more liberal language of the new rules. Indeed, it is clear that very many of such decisions are no longer law.⁶ So far, however, as they appear to establish *principles* which may be supposed to still exist, they are to the effect stated in the following paragraphs:—

§ 239. Some of the decisions cited in the footnotes were, it will be noticed, before the Judicature Acts and Rules, but it would appear that the *principles* they establish are sound, and ought still to be acted upon. It would thus, on principle, appear that there exist two great limitations on the exercise of the power of amendment.

First. An amendment ought never to be made for the mere purpose of conferring jurisdiction.⁷

Secondly. An amendment ought never to be made where it would be impossible if this were done to replace the opposite party in the position in which he formerly stood, and irremediable hardship would consequently be inflicted upon him by permitting the amendment.⁸ In accordance with this principle, where more than six months after action brought, defendants sought to amend by the first time setting up a defence that the liability for the act complained of rested with a third person against whom all remedy had been lost because he was only liable if sued within six months

¹ *Edwards v. Hodges*, 1855.

² *Buckland v. Johnson*, 1854.

³ *Knowlman v. Bluett*, 1873. See *Watkins v. Morgan*, 1834.

⁴ *Ld. Bolinbroke v. Townsend*, 1873.

⁵ *Mills v. Scott*, 1873.

⁶ See, also, *Wilkin v. Reed*, 1854; *Lucas v. Tarleton*, 1858; *Roles v. Davis*, 1859.

⁷ *Hopper v. Warburton*, 1863.

⁸ *Steward v. North Metropolitan Tram. Co.*, 1886, C. A.

of the act, leave to make the amendment was refused.¹ On this principle, although the mere impropriety or harshness of an action ought to have no effect in influencing the decision of the judge,² an amendment has been refused where the matter sought to be expunged has been purposely and improperly introduced, with the view of creating a prejudice against the other side; as, for instance, where a complaint contains averments and innuendoes unfairly connecting the plaintiff with parts of an alleged libel, which, in fact, related to other persons.³ Moreover, as the rules for allowing amendments at *Nisi Prius* are intended to meet variances arising from mere slips or accidents, the judge will be very reluctant to allow an amendment, where the party has *intentionally* framed his pleading in such a manner as to give rise to the objection.⁴ When it turns out at the trial that the plaintiff, having misconceived his remedy, seeks to convert the proceedings into an action of a different character, an amendment will usually be refused—certainly at *Nisi Prius*—and never granted on other than strict terms.⁵

§ 240. On this latter principle, the court has, to prevent injustice, refused to amend a variance, where it appeared likely that such variance has prevented the defendant from pleading a good bar to the action,⁶ or where the amendment proposed would in all probability have caused the defendant either to raise a question of law,⁷ or to plead different defences from those on the pleadings,⁸ or would introduce an entirely new contract and new breach,⁹ or, perhaps even, any entirely new matter.¹⁰

¹ *Steward v. North Metropolitan Tram. Co.*, 1886, C. A.

² *Doe v. Edwards*, 1834 (Parke, B.); *Doe v. Leach*, 1841. See *Brennan v. Howard*, 1856.

³ *Prudhomme v. Fraser*, 1834 (Ld. Denman).

⁴ *Bowers v. Nixon*, 1847 (Maule, J.); *Clowes v. Hilliard*, 1876 (Jessel, M.R.). But see *Whitwill v. Scheer*, 1838, cited ante, § 234.

⁵ See *Jacobs v. Seward*, 1872, H. L.; *Newby v. Sharpe*, 1877, C. A.; *Clark v. York*, 1882; *Hipgrave v. Case*, 1885, C. A.; *Clark v. Wray*, 1885. See, however, *Laird v. Briggs*, 1881, C. A.; *Cargill v. Bower*, 1878.

⁶ *Ivey v. Young*, 1836 (Alderson,

B.).

⁷ *Evans v. Powis*, 1847; *Bury v. Blogg*, 1848; *Martyn v. Williams*, 1857.

⁸ *Perry v. Watts*, 1842, explained in *Gurford v. Bayley*, 1842; *Frankum v. Ld. Falmouth*, 1835.

⁹ *Brashier v. Jackson*, 1840; *Boucher v. Murray*, 1844; *Richards v. Bluck*, 1848; *Moncrieff v. Reade*, 1848.

¹⁰ *David v. Preece*, 1843. See *Gull v. Lindsay*, 1849; and *Addington v. Magan*, 1851. For examples, see *Perry v. Watts*, 1842, explained by Maule, J., in *Gurford v. Bayley*, 1842; *Frankum v. Ld. Falmouth*, 1835.

§ 241. Independently of actual decisions, there is very little doubt that the judge may allow a paragraph raising a new defence *to be added* at the trial, whenever it is necessary for the purpose of placing on the record the real question in dispute.¹ It often happens, as was once observed by Maule, J., that in consequence either of imperfect instructions given to the pleader, or of ignorance, or of oversight, the substantial point intended by the parties to be tried is not raised by the pleadings;² and when this occurs it would be obviously unjust to refuse an amendment.³ It was, however, said (before the Judicature Acts) that a direction that all amendments necessary for determining the real question in controversy “*shall be made,*” does not make it *imperative* on the court to allow a plea to be substituted after issue joined, even though the application be made prior to the trial, and though it be supported by an affidavit that the real question in controversy between the parties can only be raised on the record by the introduction of the proposed plea.⁴

§ 241A. All disputed questions of amendment depend upon the discretion of the judge; the Court of Appeal⁵ will, therefore, always be very unwilling to interfere with that discretion, save in a case where it is obvious that some serious mischief would result from non-interference.⁶

§ 242. It remains to notice a few *practical* points respecting the exercise of powers of amendment, which, though decided under earlier statutes, probably would, in general, be acted upon even with regard to the powers of amendment conferred by the Judicature Acts: First, an amendment at *Nisi Prius* must be made, if at all, during the trial and before the verdict;⁷ unless, indeed, the opposite party waives his right to enforce this amount of strictness, in which case it would suffice if the amendment were made within the time allowed for moving, provided it were ultimately in agreement with the judge’s note.⁸ Secondly, the amendment must be allowed by the presiding judge, who, it seems, may be the sheriff or his officer.⁹ Thirdly,

¹ Mitchell v. Crassweller, 1853.

² Wilkin v. Reed, 1854.

³ See *supra*, note ³ to § 227, and *infra*, § 253, as to the spirit in which applications for amendments ought to be entertained.

⁴ Ritchie v. Van Gelder, 1854.

⁵ See R. S. C. 1883, Ord. LVIII.

r. 4, cited post, § 1883.

⁶ Golding v. Wharton Salt Works Co., 1876, C. A.

⁷ Brashier v. Jackson, 1840; Doe v. Long, 1841 (Coleridge, J.).

⁸ Jones v. Hutchinson, 1851.

⁹ Hill v. Salt, 1834. Compare Cox v. Hill, 1892.

when, in consequence of an amendment being allowed in a statement of claim, some alteration becomes necessary in the defence, the court will direct this also to be made, should the counsel for the defendant decline to interfere or to amend the pleadings himself.¹ Fourthly, a divisional court² will not control the discretion of the judge either in refusing³ or allowing⁴ an amendment to be made, unless upon clear proof that he was wrong, or, at least, unless it be shown, by affidavit, that the defendant has been prejudiced by the amendment. In all these cases, if both parties consent, a larger power may be exercised, either by the judge at Nisi Prius, by the person substituted in his stead, or by the court above.⁵

§ 243. It is difficult to lay down any distinct rule as to the terms with regard to costs, and otherwise, upon which an amendment will be permitted. Each case must, in a great degree, depend upon its own particular circumstances. As a general proposition it may be said that the court will not allow any additional expense to be thrown upon the opposite party by reason of any amendment.⁶ Thus, if the defendant has put a defence on the record, the proof of which will be rendered unnecessary by the plaintiff's amendment, or has summoned witnesses, whom it will thereby become needless to call, or has otherwise been at any *bonâ fide* expense in preparing to disprove the original allegations, the plaintiff will only be permitted to amend on payment of the costs occasioned by his error. If the defendant, in consequence of plaintiff's amendment, will require to alter his statement of defence, or to summon other witnesses, the trial will at least be postponed, and the plaintiff obliged to pay the costs of the postponement. In cases where a variance cannot have misled the opposite party, an amendment will be allowed without the payment of any costs.⁷

§ 244. Although the judge at Nisi Prius has a discretionary

¹ *Perry v. Fisher*, 1846 (Ld. Denman).

² So, too, the C. A., see *supra*, § 241A.

³ *Doe v. Errington*, 1834; *Jenkins v. Phillips*, 1841 (Coleridge, J.); *Whitwill v. Scheer*, 1838 (Patteson, J.); *Holden v. Ballantyne*, 1860. See *Lucas v. Beale*, 1851; *Brennan v. Howard*, 1856.

⁴ *Sainsbury v. Matthews*, 1838 (Ld. Abinger).

⁵ *Parry v. Fairhurst*, 1835, noticed by *Patteson, J.*, in *Guest v. Elwes*, 1836; *Roberts v. Snell*, 1840; *Brashier v. Jackson*, 1840.

⁶ *Smith v. Brandram*, 1841 (Tindal, C.J.).

⁷ *St. Losky v. Green*, 1860.

power of awarding or refusing costs in the event of an amendment, the court will take care that no injustice is done by his accidentally omitting to give directions on the subject. Therefore, when an order had been obtained by the plaintiff, enabling him to withdraw the record and amend his pleadings, but no mention was made as to costs, the court held that, as the variance had been corrected for the benefit of the plaintiff, he was bound to liquidate the defendant's costs of the day.¹

§ 245. As already stated,² the present Rr. S. C., which have been referred to as to amendments, "apply to all civil proceedings on the Crown side of the Queen's Bench Division, including mandamus and prohibition, and also to quo warranto, and to all proceedings on the Revenue side of the said Division."³ Such Rules further apply to the High Court exercising jurisdiction in Bankruptcy, which now forms part of the Supreme Court,⁴ to Admiralty actions, and to Probate actions, and to such of the County Courts as have Bankruptcy jurisdiction.⁵ But they do not affect the procedure or practice, either in criminal proceedings, or in proceedings for Divorce or other Matrimonial Causes.⁶ In the Divorce Court the only material rule respecting the amendment of pleadings was promulgated in 1875, and is thus expressed:—"Either of the parties before the court desiring to alter or amend a pleading may apply by summons to one of the registrars for an order for that purpose."⁷

§ 246. Large powers of amendment are also possessed by the County Courts, when errors have been committed with respect to the names, descriptions, numbers, or representative characters of the plaintiffs and defendants;⁸ and, in addition to these powers, it is provided⁹ that a County Court judge "may at all times amend all defects and errors in any proceeding in the court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all

¹ *Skinner v. Lond. & Bright. Ry. Co.*, 1850.

² Ante, § 221.

³ Ord. LXVIII. r. 2.

⁴ 46 & 47 V. c. 52 ("The Bankruptcy Act, 1883"), § 93.

⁵ *Ibid.*, § 100.

⁶ Ord. LXVIII. r. 1.

⁷ Rules in Div. and Mat. Causes, r. 187. See also rr. 35—37.

⁸ See Cy. Ct. Rules, 1889, Ord. XIV. See *Mills v. Scott*, 1878, cited ante, § 237.

⁹ By § 87 of "The County Courts Act, 1888" (51 & 52 V. c. 43).

such amendments may be made with or without costs, and upon such terms as the judge may think just; and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be so made, if duly applied for." Still, if the particulars of the plaintiff's claim do not disclose a case within the jurisdiction of the County Court, the judge has no power to amend them, so as to turn the complaint into one over which he has cognisance.¹

§ 247. The Civil Bill Courts in Ireland possess² powers of amendment; for, by § 2 of the Act regulating their practice,² "it shall and may be lawful for the several assistant barristers, and judges on appeal, and they are hereby respectively empowered, in all cases, to amend all variances between the statement of the cause of action in any civil bill, or other process or proceeding in their respective civil bill courts, and the evidence in support of such cause of action, and also to amend all variances, omissions, and misdescriptions in the descriptions, additions, and residence of the parties, or any of them, or otherwise howsoever, of or in any such process, or between the original and any copy or copies thereof, provided such last-mentioned variances, omissions, or misdescriptions shall not, in the opinion of the assistant barrister, be calculated to mislead the defendant or defendants therein; and in every case of any misjoinder of parties or causes of action, it shall and may be lawful for every assistant barrister to strike out of the process the name or names of any one or more plaintiffs or defendants, or any count or counts in such process, by reason of whom or which such misjoinder shall arise, and thereupon to proceed therein as to justice shall appertain."³

§ 247A. We have now indicated in a general way, and so far as they appear to be relevant to a work on Evidence, the principles which regulate amendments in *civil* cases. The subject of amendments in criminal cases remains for consideration.

§§ 248—51. We have seen that in 1828⁴ some powers of amendment of variances in criminal cases were given,⁵ these powers were

¹ Hopper v. Warburton, 1862 (Mellor, J., in B. Ct.).

² By 14 & 15 V. c. 57 ("The Civil Bill Courts (Ireland) Act, 1851"), § 106.

³ Further powers of amendment are given to the Civil Bill Cts., and

to the "judge of assize on appeal," by 27 & 28 V. c. 99, § 48, Ir.

⁴ By 9 G. 4, c. 15. See ante, § 220.

⁵ See R. v. Cooke, 1836; R. v. Hewins, 1841; R. v. Christian, 1842.

exceedingly limited. Accordingly, in 1848, and the following year, the limited provisions of the Act of 1828 were greatly extended, and made applicable to *all offences* whatever.¹ In 1851, at the instance of Lord Campbell, an Act was passed,² which has placed criminal proceedings on nearly the same footing with civil actions, in respect to the amendment of variances between the record and the proof.³

¹ By 11 & 12 V. c. 46, § 4, as to assize courts; and 12 & 13 V. c. 45 ("The Quarter Sessions Act, 1849"), as to sessions, the provisions of which Act are extended to *Irish* quarter sessions by 27 & 28 V. c. 99, § 49, Ir. The inferior courts in *Scotland* have now, under "The Summary Procedure Act, 1864" (27 & 28 V. c. 53), § 5, large powers of amending complaints before them with respect to variances and other defects.

² 14 & 15 V. c. 100 ("The Criminal Law Procedure Act, 1851").

³ The principal provisions of this Act are as follows: § 1, "Whenever, on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment,—or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein,—or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence,—or in the Christian name or surname, or both Christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described,—or in the name or description of any matter or thing whatsoever therein named or described,—or in the ownership of any property named or described

therein,—it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance *not material to the merits of the case*, and that the defendant *cannot be prejudiced thereby in his defence on such merits*, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at *Nisi Prius*, the order for the amendment shall be indorsed on the *postea*, and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued, as it may be necessary to amend, shall be amended accordingly by the proper officer; and in all other cases the order for the amendment shall either be indorsed on the indictment, or shall be engrossed on parchment, and filed, together with the indictment, among the records of the court. Provided always that, in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite the recognisances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accord-

§ 252. Under the provisions of the Act just referred to, an indictment charging the defendant with having obstructed a foot-way may be amended, when one of the termini of the way has been misdescribed, provided the variance be not calculated to prejudice the defence; ¹—an amendment may be made when the ownership of stolen property, ² or the stolen property itself, ³ is wrongly described;—the misnomer of a party injured may be rectified; ⁴—the misdescription of any persons described in the indictment may be set right; ⁵—an erroneous date ascribed to the passing of a statute may be struck out; ⁶—an indictment for perjury alleging that the crime was committed on a trial for burning a *barn*, may (to meet the facts) be amended by alleging its commission on a charge of firing a *stack*.⁷ It, moreover, is not too late to apply for an amendment, even though the counsel for the prisoner may have addressed the jury.⁸

§ 252A. In general, however, the court will not amend an indictment after plea, if, in its amended form, it would be open to a demurrer.⁹ Neither can an amendment be made after verdict.¹⁰

ingly; in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognisances for that purpose, in such and the same manner as if they were originally bound by their recognisances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed;” and a further proviso directs, “that, where any such trial shall be to be had before another jury, the Crown and the defendant shall respectively be entitled to the same challenges, as they were respectively entitled to before the first jury was sworn.” By § 2, “Every verdict and judgment, which shall be given after the making of any amendment under the provisions of this Act, shall be of the same force and effect in all respects, as if the indictment had originally been in the same form in which it was after such amendment was made.” By § 3, “if it

shall become necessary at any time for any purpose whatsoever to draw up a formal record, in any case where any amendment shall have been made under the provisions of this Act, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made.” See further as to amendment of formal defects in indictment, § 25 of the Act, post, § 280, n. ¹.

¹ R. v. Sturge, 1854.

² R. v. Vincent, 1852; R. v. Fullarton, 1853.

³ R. v. Gumble, 1872.

⁴ R. v. Welton, 1862.

⁵ R. v. Western, 1868.

⁶ R. v. Westley, 1859.

⁷ R. v. Neville, 1852 (Williams, J.); R. v. Tymms, 1870 (Lush, J.).

⁸ R. v. Fullarton, 1853 (Ir.) (Lefroy, C.J., and Monahan, C.J.); overruling R. v. Rymer, 1853 (Williams, J.).

⁹ R. v. Lallement, 1853. Sed qu. The case, as reported, is not satisfactory.

¹⁰ R. v. Larkin, 1854; R. v. Frost, 1855.

Nor will the court amend an amendment, or restore an indictment, once amended, to its original form.¹ Where a prisoner was indicted for a statutable forgery, but the evidence only sustained a forgery at common law, an amendment on the indictment by striking out the word “feloniously” (thus converting a charge of felony into one of misdemeanour), has been refused.²

§ 253. The Acts which authorise amendments in criminal proceedings are founded on the policy that substantial justice is of more real importance than technical precision, and they accordingly seek to render punishment more certain, by neutralising the effect of trivial variances, which have constantly protected the wrong-doer. So long as the least rational doubt exists respecting his guilt, juries should weigh with jealousy the evidence against a prisoner; and judges should see most clearly that the act, with which he is charged, is an offence against the law. But when courts of justice go further than this, and permit the law to be defeated by technical errors, which cannot by possibility mislead a defendant, and which have nothing to do with the substantial merits of the case, they take the most effectual means of rendering the administration of the criminal law a fitting subject for contempt and ridicule. In civil causes, the Rules authorising amendments receive a liberal construction.³ Why should an unduly strict construction be applied in criminal courts? The statutes themselves warrant no such distinction, and to introduce into the interpretation of them the old doctrine “strictissimi juris,” is to misunderstand and misapply the meaning of that doctrine.

§ 254. Having drawn attention to the Rules and the Acts now authorising amendments, whether in civil or criminal proceedings, and the leading decisions upon their construction, some three or four *general* rules, which regulate the law of *variance*, may, with utility, be noticed; for although a discrepancy between the allegation and the proof is not (as formerly) fatal, if immaterial to the substantial merits, yet it may still entail considerable expense and responsibility as to costs on the party, who is driven by a “variance” to apply for an amendment. It is in view of this that the

¹ R. v. Barnes, 1866; R. v. Pritchard, 1867; R. v. Webster, 1861.

² R. v. Wright, 1860 (Hill, J.).

³ See as to the spirit in which they should be regarded, *supra*, § 227, and note ³ thereto.

subject is still discussed in this work, and in applying the strict rules which exist as to variances, the ample power of amendment now possessed by the courts must not be forgotten. Subject to this observation, the rules with regard to variance may be stated to be *four* in number, and are as follow:—(1) *Surplusage need not be proved*; (2) *Cumulative allegations, or such as merely operate in aggravation, are immaterial*; (3) *Mere formal allegations need not be proved*; (4) *But allegations of matter of essential description must be proved as laid*. Having stated these four important rules, the remainder of this chapter will be devoted to discussing them in detail—

§ 255.¹ The first rule as to “variances” is, that *surplusage need not be proved, and that the proof, even if offered, should be rejected*. “Surplusage” comprehends whatever may be stricken from the record without destroying the right of action, or the charge, on the one hand, or the defence on the other. This, it is true, is a loose, and therefore unsatisfactory, definition; but it is difficult, if not impossible, to find one more distinct and practical. Each case must, in a great measure, depend on its own particular circumstances. The best general idea of what will, or will not, amount to surplusage, is to be gained from one or two decisions on the point. Thus, where the pleading in an action for breach of a warranty that some claret was in a certain state alleged that it was not, and that *the defendant well knew* it was not in that state, but at the trial no evidence was given of the defendant’s knowledge, after a verdict for the plaintiff, a motion having been made for a new trial, on the ground that the scienter, having been alleged, ought to have been proved, the court were unanimously of opinion that the allegation of the scienter was wholly unnecessary and immaterial, and therefore required no proof.² Said Lord Ellenborough: “If the whole averment respecting the defendant’s knowledge of the unfitness of the wine for exportation were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved. For, if one man lull another into security as to the goodness of a commodity, by giving him a war-

¹ Gr. Ev. § 51, in part.

by Ld. Abinger in *Cornfoot v. Fowke*,

² *Williamson v. Allison*, 1802; cited 1840.

ranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale; the warranty is the thing which deceives the buyer, who relies on it, and is thereby put off his guard. Then, if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit." Said Lawrence, J.: "I take the rule to be, that if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, although the averment be more particular than it need have been, the whole must be proved, or the plaintiff cannot recover."¹

§ 256—7.² On the same principle, in an action for removing earth from the defendant's land, whereby the foundation of the plaintiff's house was injured, the allegation of bad intent in the defendant need not be proved, for the cause of action is perfect, independent of the intention;³ in an action for impounding cattle in an unfit pound, an averment that the pound was "at all times unfit, as the defendant well knew," may be rejected as immaterial, and consequently it requires no proof;⁴ if plaintiff's pleadings disclose a state of facts upon which an action may be maintained, although it may also (needlessly) allege malice or fraud, the plaintiff is not bound to prove either, and may recover upon the liability which the facts disclose, and this even if both fraud and malice be actually disproved;⁵ in an action against a common carrier for the loss of property intrusted to him, negligence, though averred, need not be proved;⁶ in trespass, for driving against the plaintiff's cart, an averment that he was in the cart is immaterial;⁷ an averment that the defendant wrongfully cut in plaintiff's close, *used as a private road*, a certain large sewer, and thereby diverted the water from a pond, was held clearly immaterial, so far as regarded

¹ In *Williamson v. Allison*, 1802. See, also, *Jackson v. Allaway*, 1844; *Att.-Gen. v. Clerc*, 1844; *Tempest v. Kilner*, 1845; *Anderson v. Thornton*, 1853; *Thom v. Bigland*, 1853; *Southall v. Rigg*, and *Forman v. Wright*, 1851.

² Gr. Ev. § 64, as to first four lines.

³ *Panton v. Holland*, 1819 (Am.); *Twiss v. Baldwin*, 1832 (Am.).

⁴ *Bignell v. Clarke*, 1860.

⁵ *Swinfen v. Lord Chelmsford*, 1860.

⁶ *Richards v. Lond. & South Coast Ry. Co.*, 1849. See ante, § 187.

⁷ *Howard v. Peete*, 1817.

the words marked in italics, and the plaintiff entitled to recover damages, though it appeared that the sewer was cut previously to the construction of the road. "For," said Tindal, C. J., "what has it to do with the wrongful act of the defendant, or the measure of damages which the plaintiff is entitled to claim, whether the defendant used his close as a road, an orchard, or a garden?"¹

§§ 258—262. In the former editions of this work many further examples of averments in pleading in civil cases which were "surplusage," and consequently "immaterial," were given, but having regard to the present liberal state of the law with regard to amendments, it is not thought advisable to weary the reader with any further examples of the application of the rule in civil cases.^{1a}

§ 263. The law rejecting surplusage applies equally in criminal as in civil proceedings. The application of the rule that immaterial averments (or "surplusage") need not be proved in criminal cases may, moreover, be usefully exemplified. For instance, if a party be indicted for robbery *in the dwelling-house of A. B.*² or for arson *in the night time*,³ the allegations marked in italics may be rejected as surplusage, and, consequently, need not be proved;⁴ and where one section of a statute⁵ (now repealed) said that a certificate *given knowingly* and wilfully, with intent to deceive, should be a misdemeanour, and a separate clause made it a distinct offence to give such a certificate *without having visited the patient*,⁵ it was held that a conviction on an indictment, blending two distinct offences in one charge, and stating that defendant *knowingly, and with intention to deceive, signed the certificate without having visited the patient*, was, after a verdict in which the jury

¹ Dukes v. Gostling, 1835.

^{1a} Examples of the application of the old law are contained in Powell v. Bradbury, 1849 (see, however, Lush v. Russell, 1850, where this case is denied to be law); Smith v. Lovell, 1850; Horton v. M'Murtry, 1860; Keller v. Blood, 1861 (Ir.); R. v. M'Kenna, 1842 (Ir.); R. v. Durore, 1784; and R. v. Upton-on-Severn, 1833.

² R. v. Pye, 1790; R. v. Johnstone, 1793 (by all the judges); see, also, R. v. Wardle, 1800.

³ R. v. Minton, 1786.

⁴ For other instances, see R. v. Phillips, 1818; R. v. Oxford, 1819; R. v. Summers, 1705; R. v. Hickman, 1784; R. v. Radley, 1849; R. v. Otway, 1849 (Ir.); R. v. Williams, 1850; R. v. Kealey, 1851; R. v. Healey, 1824.

⁵ 9 G. 4, c. 41, §§ 9, 29, and 30.

negatived any intent to deceive, but found the defendant 'guilty, held to have been rightly recorded, since, on the charge under the latter clause of the statute (viz., that of having certified without visiting), the averment of intention was mere surplusage.¹

§ 264. On the same principle, too, where an indictment charged the defendants with conspiring to indict the prosecutor *falsely*, with intent to extort money, they were held to be rightly convicted, though the jury, in finding them guilty of conspiring to indict with the intent alleged, expressly negatived any conspiracy to make a false charge; for the court observed that a conspiracy to prefer an indictment for purposes of extortion was doubtless a misdemeanour, whether the charge were true or false.² Again, where a parish was indicted for non-repair of a highway, an allegation that the road in question was an immemorial highway has been rejected as surplusage;³ on an indictment for *jointly* receiving stolen property, persons guilty of separately receiving any part of such property may by statute be convicted;⁴ and on an indictment charging a common law offence as having been committed "against the form of the statute," the allegation in question may be rejected as surplusage.⁵

§ 265. The second rule⁶ respecting variances is, that *cumulative allegations, or such as merely operate in aggravation, are immaterial, provided that sufficient is proved to establish some right, offence, or justification, included in the claim, charge, or defence specified on the record.*⁷ For example, where a defendant was charged in an information with *composing*, printing, and publishing a libel, but no evidence having been given to show that he was the *author*, his counsel having claimed an acquittal, Lord Ellenborough⁸ observed, "It is enough to prove publication. If an indictment charges that the defendant *did and caused to be done*" a particular act, it is enough to prove either. The distinction runs through the whole criminal law; and it is invariably enough to prove so much of the indict-

¹ R. v. Jones, 1831.

² R. v. Hollingberry, 1825.

³ R. v. Turweston, 1830.

⁴ 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 94.

⁵ R. v. Mathews, 1793. See, also, 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 24, cited

post, § 280, n. 1.

⁶ Supra, § 254.

⁷ R. v. Macpherson, 1869.

⁸ See R. v. Hunt, 1811; S. P. in R. v. Williams, 1811 (Lawrence, J.).

⁹ S. P. (Ld. Mansfield) in R. v. Middlehurst, 1757.

ment as shows that the defendant has committed a substantive crime therein specified."

§ 266. Accordingly at common law, on an indictment for murder the prisoner may be convicted of manslaughter, for the averment of malice aforethought is merely matter of aggravation;¹ on an indictment for treason or conspiracy charging several overt acts, it is sufficient to prove one;² and on an indictment for obtaining property by several false pretences, it is not necessary to prove them all, unless they are so connected as to be incapable of separation,³ but it will suffice to prove the one or more, by which the property was in fact obtained.⁴

§ 267. Moreover, if a compound intent, or several intents, be laid in the indictment, and if one part of the compound intent, or each of the several intents, when coupled with the act done, constitute an offence, it will not be necessary to prove the whole as laid. For example, an indictment for killing a sheep, with intent to steal the whole carcase, will be supported by proof of an intent to steal part of the carcase;⁵ if a prisoner be charged with obtaining an order for a certain sum from the prosecutor with intent to defraud him of the *same*, he may be legally convicted, though it appears that his real intention was to cheat the prosecutor out of a small portion only of the proceeds of the order;⁶ under the old law a man accused of assaulting a girl with intent to abuse her and carnally know her, might be found guilty of an assault with intent to abuse simply;⁷ and a party indicted for publishing a libel with intent to defame certain magistrates, and also to bring the administration of justice into contempt, may be found guilty, if the libel was published with *either* of those intents.⁸

§ 268. But the intent proved must either correspond with, or be included in, the intent alleged. Thus, it will be a fatal variance if an indictment for burglary charge an intent to steal, and it be

¹ Co. Lit. 282 a.

² Post. 194.

³ R. v. Wickham, 1839.

⁴ R. v. Hill, 1811.

⁵ R. v. Williams, 1825. The same point seems to have been ruled by Cresswell, J., in R. v. Marley, 1842. The principle in both cases was "that the offence of intending to steal a

part was part of the offence of intending to steal the whole, and that the statute meant to make it immaterial whether the intent applied to the whole, or only to part."

⁶ R. v. Leonard, 1848.

⁷ R. v. Dawson, 1821 (Holroyd, J.).

⁸ R. v. Evans, 1821 (Bailey, J.).

shown that the real intent was to commit rape or murder ;¹ and a prisoner charged with burglary and stealing will be acquitted, if no property was taken, though it appear that the house was entered with an intent to steal ; and though, had larceny actually been committed, he would have been convicted without any allegation in the indictment of a felonious intent.²

§§ 269—70A. The rule that matters merely of aggravation are material, provided enough be proved to establish some substantial right, offence or defence included in the proceeding upon the record has been adopted by statute on several occasions. For example, by statute, on an indictment for burglary and stealing, if the prosecutor establish his case with the exception of proving that the breaking was by night, the prisoner may be convicted of housebreaking ;³ if no breaking be proved, but the property stolen be laid in the indictment, and be proved by the evidence, to be of the value of five pounds, the verdict may be guilty of stealing in a dwelling-house to that amount,⁴ the prisoner may be found guilty of larceny, if the evidence be not sufficient to prove the commission of the more aggravated crime ;⁵ if no satisfactory evidence be offered to show, either that the house laid in an indictment as such was a dwelling-house, or some building communicating therewith ; or that it was the dwelling-house of the party named in the indictment ; or that it was locally situated as therein alleged ; or that stolen property, laid as of that value, was of the value of five pounds, provided it appear that any goods were stolen by the prisoner, he may be convicted of simple larceny ;⁶ and the same law applies on a charge of stealing in a dwelling-house with menaces,⁷ or of stealing from the person, with or without violence,⁸ or of stealing as a servant,⁹ while an indictment under the statute for horse-stealing, though bad for not describing the animal by any term used in the Act, will support a conviction for larceny ;¹⁰ a

¹ 2 East, P. C. 514.

² *R. v. Furnival*, 1821 ; *R. v. Vandercomb*, 1796.

³ Under 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 56.

⁴ *Ibid.*, § 60 ; see *R. v. Compton*, 1828 (Gaselee, J.).

⁵ 2 Hale, 302 ; 2 East, P. C. 784.

⁶ *R. v. Bullock*, 1825 ; *R. v.*

Brookes, 1847 (Patteson, J.) ; *R. v. Jackson*, 1842 (Cresswell, J.).

⁷ See 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 61.

⁸ *Ibid.*, §§ 40, 43.

⁹ *R. v. Jennings*, 1858 ; 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 67.

¹⁰ *R. v. Beaney*, 1820.

woman charged with the murder of her infant may be convicted of endeavouring to conceal its birth;¹ a person indicted for felony in administering poison so as to endanger life, or to inflict grievous bodily harm, may be convicted of the misdemeanour of administering poison with intent to injure, aggrrieve, or annoy some one;² on the trial of an indictment for simple or aggravated robbery, the jury may convict of a simple or aggravated assault with intent to rob, if the evidence shall prove such an offence to have been committed;³ upon a count for maliciously wounding, or for maliciously inflicting grievous bodily harm, against the statute, a prisoner may be convicted of a common assault, even though the term "assault" be not found in the indictment;⁴ and it is provided⁵ that, "if, on the trial of any person charged with any felony or misdemeanour,⁶ it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that the defendant is not guilty of the felony or misdemeanour charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanour charged in the said indictment; and no person, so tried as herein lastly mentioned, shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanour for which he was so tried."⁷

¹ 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 60.

² *Ibid.*, § 25.

³ 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 41; *R. v. Mitchell*, 1852. See *R. v. Woodhall*, 1872 (Denman, J.).

⁴ *R. v. Taylor*, 1868; *R. v. Canwell*, 1869; *R. v. Oliver*, 1860; *R. v. Yeadon*, 1861. See, also, *R. v. Guthrie*, 1870.

⁵ 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 9, replacing 7 W. 4 & 1 V. c. 85, § 11 (which was worded differently, and is repealed by 14 & 15 V. c. 100, § 10); as to the

construction of which, see *R. v. Bird*, 1851. See *R. v. M'Pherson*, 1857.

⁶ See *R. v. Ryland*, 1868; *R. v. Haggood and Wyatt*, 1870.

⁷ The Articles of War for the government of the Navy establish rules similar to those recognized by canon and statute law. "The Naval Discipline Act, 1866" (29 & 30 V. c. 109), expressly enacts, indeed, in § 48, that "where any prisoner shall be charged with murder, a court-martial may find him guilty of manslaughter, or of a common assault; where he shall be charged with sodomy, a court-martial may find

§ 271—7. The rule that mere “*cumulate allegations*,” or “*averments in aggravation*,” need not be proved not only prevails in criminal cases, but equally obtains in civil actions. For instance, in an action for defamation, if the plaintiff allege special damage, he need not prove it, provided the words be actionable *per se*;¹ in an action on a policy of insurance, the material allegation is the loss; but whether total or partial, is a mere question of degree; and if the former be alleged, proof of the latter is sufficient.² In all cases, indeed, a party may in his statement of claim sue for a less right than he is able to prove, provided that the lesser right claimed does not differ in kind from, but is included in, the greater right proved.³

§ 278—9. The third rule⁴ with regard to variances is that mere *formal allegations* need not be proved. “Formal allegations” comprise,—among other matters,—all those averments of *place, time, number, value, quality*, and the like, which may be inserted in the pleadings, without being either essentially descriptive of the subject of the claim or charge, or otherwise rendered material by special circumstances, and also a multitude of other idle statements, which, in former times, English lawyers loved to introduce into

him guilty of an indecent assault; where he shall be charged with theft, a court-martial may find him guilty of an attempt to thieve, or of embezzlement, or of wrongful appropriation of property belonging to another; and, generally, where any prisoner shall be charged with any offence under this Act, he may, upon failure of proof of the commission of the greater offence, be found guilty of another offence of the same class involving a less degree of punishment, but not of any offence involving a greater degree of punishment.”

“The Army Act, 1881” (44 & 45 V. c. 58), in § 56 thereof, also contains provisions to the same effect, and enacting that any prisoner charged before a court-martial with stealing may be found guilty of embezzlement, or of fraudulently misapplying money or property; and if he be charged with embezzlement may be convicted of stealing, or of fraudulent misapplication; and if he

be charged with desertion may be found guilty of attempting to desert, or of being abroad without leave; and if he be charged with attempting to desert may be found guilty of desertion or of illegal absence. The section then concludes with a general, but not very happily expressed, enactment, that “a prisoner charged before a court-martial with any other offence under this Act may, on failure of proof of an offence being committed under circumstances involving a higher degree of punishment, be found guilty of the *same* offence as being committed under circumstances involving a less degree of punishment.”

¹ *Smith v. Thomas*, 1835 (Tindal, C.J.).

² *Gardner v. Croasdale*, 1760; *Benson v. Chapman*, 1848, H. L.; *King v. Walker*, 1863.

³ *Duncan v. Louch*, 1845; *Bailey v. Appleyard*, 1838 (Coleridge, J.).

⁴ *Supra*, § 254.

every legal document. Since the modern amendments in the law, the rule in question has fortunately become a matter more of historical curiosity than of present practical interest.

§ 280. Indeed, so far as civil actions are concerned, this rule has passed into a dead letter; and Lord Campbell's Act of 1851,¹ renders it of little importance even in criminal cases. With regard to averments of *place*, it is now sufficient in all cases, *excepting where local description is required*, to state in the margin of the indictment the county, city, or other jurisdiction, as the venue for all the facts averred in the body of the indictment.²

¹ 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 23, enacting, that "it shall not be necessary to state any *venue* in the body of any indictment, but the county, city or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment; provided that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment; and provided also, that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue." § 24 enacts, that "no indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record,' or of the words 'with force and arms,' or of the words 'against the peace,' nor for the insertion of the words 'against the form of the statute,' instead of 'against the form of the statutes,' or vice versa, nor for that any person mentioned in the indictment is designated by a name of office, or other descriptive appellation instead of his proper name, nor for omitting to state the time at

which the offence was committed in any case where time is not of the *essence of the offence*, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence." § 25 enacts, that "every objection to any indictment for any *formal defect* apparent on the face thereof shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court, before which any such objection shall be taken for the formal defect, may, if it be thought necessary, cause the indictment to be forthwith *amended* in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared."

² As to the former law, see *R. v. Hollond*, 1794; *R. v. Haynes*, 1815; *R. v. Feargus O'Connor*, 1843; 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 20. Even before the Act it was no objection in the case of a transitory felony that there was

§ 281. In indictments, however, for those offences which the law regards as bearing a *local character*, the proof respecting the place must still correspond with the allegation; though probably in many cases of variance on this point the courts would sanction an amendment of the record.¹ The distinction between local and transitory offences is not very clearly drawn, but among *local* offences are—among others—burglary,² but not highway robbery;³ house-breaking;⁴ stealing in a dwelling-house;⁵ sacrilege;⁶ riotously demolishing churches, houses, machinery, &c.;⁷ maliciously firing a dwelling-house, perhaps an out-house, but not a stack;⁸ forcible entry;⁹ poaching;¹⁰ nuisances to highways;¹¹ and malicious injuries to sea-banks, mill-dams, or other local property. In most of these cases it is sufficient to allege and prove the parish, township, or other local district, less than a county, in which the offence was committed;¹² but in some, a more accurate description is necessary.

§ 282. For example, an indictment for not repairing a highway must specify the situation of the road within the parish, and any substantial variance between the description and the evidence will be material;¹³ on an indictment for night poaching, it has been held, by a majority of the judges, that the locus in quo must be described either by name, ownership, occupation, or abutments, and that it is not sufficient to allege that the prisoner was found “in a certain close in the parish of A;”¹⁴ but on a charge of taking or

no such parish in the county as that in which the offence was stated to have been committed: *R. v. Woodward*, 1831; *R. v. Dowling*, 1826.

¹ 14 & 15 V. c. 100 (“The Criminal Procedure Act, 1851”), § 1, cited ante, § 249.

² 1 Russ. C. & M. 826; *R. v. St. John*, 1839.

³ *R. v. Dowling*, 1826.

⁴ *R. v. Bullock*, 1825.

⁵ *R. v. Napper*, 1824; *R. v. Jarrauld*, 1863.

⁶ Arch. Cr. Pl. 57, and p. 457 of 21st edit. (1893).

⁷ *R. v. Richards*, 1832.

⁸ *R. v. Woodward*, 1831.

⁹ 2 Leon. 186.

¹⁰ *R. v. Ridley*, 1823.

¹¹ *R. v. Steventon*, 1843.

¹² See *R. v. Napper*, 1824.

¹³ *R. v. Great Canfield*, 1810; *R. v. Upton-on-Severn*, 1833; *R. v. Steventon*, 1843. See *R. v. March Dow. of Downshire*, 1835; *R. v. Waverton*, 1851. If a carriage-way is described as a bridle-way, the variance is material: *R. v. St. Weonard's*, 1834. See, also, *R. v. Lyon*, 1824.

¹⁴ *R. v. Ridley*, 1823, under the repealed Act of 57 G. 3, c. 90, § 1; *R. v. Crick*, 1832 (Vaughan, B.), under 9 G. 4, c. 69 (“The Night Poaching Act, 1828”), § 9. In *R. v. Owen*, 1826, where the close was described by name and occupation, but the name proved was different from that alleged, the judges held that the variance was fatal. See *R. v. Andrews*, 1837 (Gurney, B.), and *R. v. Eaton*, 1851.

destroying fish in water adjoining a dwelling-house, if the boundary of any parish, township, or vill, happen to be in or by the side of such water, it is by statute sufficient to prove that the offence was committed either in the parish, township, or vill, named in the indictment, or in any such local district adjoining the water;¹ and if the charge be that of stealing oysters, or oyster brood, the bed, laying, or fishery may also by statute be described by name or otherwise, without stating it to be in any particular parish, township, or vill.² Moreover, an indictment for an *affray* cannot be sustained, unless it contain an averment that the offence was committed in a public street or highway, and unless that averment be supported by corresponding proof.³

§ 283. Why a burglar should be entitled to more accurate information respecting the house he is charged with having entered, than the highway robber can claim as to the spot where his offence is stated to have been committed, it is impossible to say; either full information should be given in all cases or in none.

§ 284. Excepting in the very few cases where *time is of the essence of the offence*, an indictment,⁴ too, need not contain any allegation respecting time.⁵

§ 285. Allegations of *number* and *value* are, also, in general immaterial in indictments. Thus, if a party be charged with stealing five horses, he may be convicted of stealing one; and if he be indicted for larceny or robbery, and the property be laid as of the value of twenty shillings, the offence will be complete, though it

¹ 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 24.

² *Id.* § 26.

³ *R. v. O'Neill*, 1871 (Ir.).

⁴ So as to coroner's inquisitions; see "The Coroners Act, 1887" (50 & 51 V. c. 71), § 20; and see, also, *R. v. Ingham*, 1864.

⁵ 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 24, cited ante, § 280, n. ¹, on p. 208. The old rule required a day to be specified, but did not require that day to be proved. But the legislature has now adopted my Uncle Toby's reply to Corporal Trim's argument in telling his unfortunate story of the King of Bohemia. "'There was a certain King of Bohemia, but in

what year of our Lord,'—'I would not give a halfpenny to know,' said my Uncle Toby. 'Only, an' please your Honour, it makes a story look the better in the face.' 'Leave out the date entirely, Trim,' said my Uncle, 'a story passes very well without these niceties, unless one is pretty sure of 'em!'" Even before the statute, where a court had no jurisdiction to try a criminal, except for an offence committed after a certain day, no objection could be taken to the indictment in arrest of judgment, for alleging that the act was done before that day, when the jury had expressly found that this was not correct. See, also, *R. v. Treharne*, 1831; and *R. v. Levy*, 1819.

appear that the article stolen was of less value than any coin of the realm, provided that it was of *some* value to the owner.¹

§ 286. In certain cases, however, value is essential to constitute the offence; as where a bankrupt is indicted for fraudulently concealing or removing property to the value of ten pounds,² or for absconding with property to the amount of twenty pounds,³ or a person is indicted for maliciously injuring property to an amount exceeding five pounds,⁴ or a tenant is indicted for stealing a chattel or fixture let to him with his house or lodging, and exceeding the value of five pounds,⁵ or a party is charged with stealing in a dwelling-house chattels, &c., to that amount,⁶ or with stealing, or with destroying or damaging, either maliciously or with intent to steal, any trees in a park, pleasure-ground, garden, or orchard, above the value of one pound, or any trees elsewhere above the value of five pounds.⁷ In such cases as these, the evidence must so far correspond with the allegation as to show that the statutable offence has been committed: that is, the property fraudulently or maliciously dealt with, stolen, or destroyed, must be proved, as well as alleged, to be of the requisite value; though if this be done, the exact amount specified in the indictment need not be proved. Where⁸ a bankrupt was charged with concealing his property, and the indictment,—after specifying many articles without stating the separate value of each,—added these words, “and also one hundred

¹ *R. v. Morris*, 1840 (Parke, B.); *R. v. Bingley*, 1833 (Gurney, B.); *R. v. Clark*, 1810. The fact of the article being in the possession of the prosecutor is, in general, evidence that it was of value to him. *Id.*

² 32 & 33 V. c. 62 (“The Debtors Act, 1869”), § 11, subs. 4, 5; as amended by 46 & 47 V. c. 52 (“The Bankruptcy Act, 1883”), § 163, and 53 & 54 V. c. 71 (“The Bankruptcy Act, 1890”), § 26; 35 & 36 V. c. 57, § 11, subs. 4, 5, *Ir.*

³ 32 & 33 V. c. 62, § 12; as amended by 46 & 47 V. c. 52, § 163; 35 & 36 V. c. 57, § 12, *Ir.*

⁴ 24 & 25 V. c. 97 (“The Malicious Damage Act, 1861”), § 51. The damage must be done at one time: *R. v. Williams*, 1862 (*Ir.*). The value of each article injured need not be

stated, but it will be sufficient to allege that the amount of the aggregate damage exceeded 5*l.*: *R. v. Thoman*, 1871.

⁵ 24 & 25 V. c. 96 (“The Larceny Act, 1861”), § 74. If the value of the property stolen do not exceed 5*l.*, the prisoner is not liable to penal servitude. *Id.*

⁶ 24 & 25 V. c. 96 (“The Larceny Act, 1861”), § 60.

⁷ 24 & 25 V. c. 96 (“The Larceny Act, 1861”), § 32; 24 & 25 V. c. 97 (“The Malicious Damage Act, 1861”), §§ 20, 21. Where several trees have been stolen or damaged at the same time, their collective value will satisfy the Act: *R. v. Shepherd*, 1868.

⁸ *R. v. Forsyth*, 1814 (all the Judges).

other articles of furniture and a certain debt due from J. T. to the prisoner, to the value of twenty pounds and upwards;"¹ the indictment was held bad, as all the property concealed was not specified, and no distinct value was put upon the articles enumerated. It, therefore, would seem that where value, being material, is ascribed to several articles *collectively*, the offence must be made out as to each of those articles.

§ 287. *Descriptions* of the subject-matter of the offence are also, in many cases, unnecessary. Thus in an indictment for embezzlement against a clerk or servant, or against a person employed either in her Majesty's public service, or in the police, if the offence relate to any money or valuable security, it is sufficient to allege that money was embezzled, without specifying any particular coin or valuable security; and such allegation may be supported by equally loose evidence;² and it seems, even by proof of a general deficiency of money that ought to be forthcoming, without showing from what persons the money was received, or of what coins it consisted, or that any particular sum was received, and not accounted for by the prisoner.³ So, also, "in any indictment in which it shall be necessary to make any averment as to any money,⁴ or any note of the Bank of England, or any other bank, it shall be sufficient to describe such money or bank-note simply as money, without specifying any particular coin or bank-note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, shall not be proved; and in cases of embezzlement and obtaining money or bank-notes by false pretences, by proof that the offender embezzled or obtained any piece of coin or any bank-note, or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly."⁵

¹ This case was decided under the repealed Act of 5 G. 2, c. 30, § 1.

including the three chiefs against seven).

² 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 71.

⁴ See *R. v. Gumble*, 1872.

³ *R. v. Grove*, 1833 (eight judges

⁵ 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), § 18.

§ 288. Allegations of *quality* (or, in other words, those allegations which describe the mode in which certain acts have been done) may often be omitted from an indictment, and it is seldom necessary to prove them with precision. For example, in an indictment¹ for murder or manslaughter, it is unnecessary to set forth the manner in which, or the means by which, the death of the deceased was caused; but it is sufficient to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased, or, in an indictment for manslaughter, that he did feloniously kill and slay him.² Moreover, should an indictment for homicide unnecessarily allege the means of death, it would be quite sufficient for the proof to agree with the allegation in its general character, without precise conformity in every particular. Similarly, on a charge of felonious assault, if it be alleged that it was committed with a staff, and the proof be that it was done with a stone; or if a wound, alleged to have been given with a sword, be proved to have been inflicted by an axe; or if a pistol be stated to have been loaded with a bullet, and it turns out to have been loaded with some other destructive material,³ the charge is substantially proved, and no variance occurs.⁴

§ 289. The fourth general and remaining rule⁵ as to variances is that *allegations of matter of essential description must be proved as laid*. The only practical mode of understanding this rule is to examine some of the leading decisions on the subject, and then to apply the reasoning or ruling contained therein to other analogous cases, always bearing in mind that the judges now have large powers of granting amendments both in civil and in criminal proceedings.⁶ And first, with respect to the criminal law, it is now clearly established, that the *name or nature of the property* stolen or damaged is *matter of essential description*. For example, the variance is fatal if, on a charge of firing a stack of hay, it turns out to

¹ This term includes inquisitions taken before coroners; *R. v. Ingham*, 1864.

² 24 & 25 V. c. 100 ("The Offences against the Person Act, 1861"), § 6.

³ *R. v. Oxford*, 1840. See *R. v. Hughes*, 1832, the marginal note of which is misleading.

⁴ 1 East, P. C. 341; *R. v. Martin*, 1832 (Parke, B.). See, further, as to the law prior to the passing of

Ld. Campbell's Act in 1851, *R. v. M'Conkey*, 1841 (Ir.) (Torrens, J.); *R. v. Waters*, 1832; *R. v. Culkin*, 1832; *R. v. Thompson*, 1826; *R. v. Kelly*, 1825; *R. v. Mosley*, 1825; *R. v. Tomlinson*, 1834 (Patteson, J.); *R. v. Turner*, 1830 (Parke, B.); *R. v. Warman*, 1846.

⁵ *Supra*, § 254.

⁶ See *ante*, §§ 220—225, 249.

have been a stack of wheat; or if a man be accused of stealing a drake, and it is proved to have been a goose, or even a duck, unless, indeed, an amendment be permitted.¹ An instance of the application of this rule, before amendments were as liberally allowed as now, occurred some years ago at assizes. A man, charged with stealing "a slop," the theft of which was clearly proved, when called upon for his defence, exclaimed, "Why, my lord, it ain't no slop." "You hear what he says," observed the judge to the jury. "Is it a slop, gentlemen?" "No, my lord, it's a smock," said they. "Then you must acquit the prisoner." He was acquitted; but the grand jury not being discharged, a second indictment was preferred and found, charging him with stealing "a smock." Nothing daunted, the prisoner now pleaded *autrefois acquit*, and called several witnesses to prove that the article he had stolen was in fact a slop, and this question was submitted to a second jury with much gravity by the learned judge.²

§ 290. Where the stealing of specified animals is made a statutory offence, it seems sufficient to use the generic term which includes the whole species, even though the language of the Act should be more specific. Thus, on an indictment for sheep stealing, framed under an Act³ making it penal to steal any "ram, ewe, sheep, or lamb," charging a man with killing a sheep, with intent to steal the carcase, it having been proved that a sheep was killed, but the sex could not be discovered, a great majority of the judges held that "sheep" was a generic term, which included equally rams, ewes, and wethers, and confirmed the conviction;⁴ an indictment for stealing a sheep will now be supported by evidence of killing a lamb;⁵ but whether a charge of stealing a horse would

¹ Under § 1 of 14 & 15 V. c. 100 ("The Criminal Procedure Act, 1851"), cited *ante*, § 249.

² 29 Law Mag. 12, 13.

³ 7 & 8 G. 4, c. 29, § 25 (now repealed). The same words are now contained in 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 10.

⁴ *R. v. M'Culley*, 1838; *R. v. Bannam*, 1839 (Ir.). These cases overrule *R. v. Puddifoot*, 1829.

⁵ *R. v. Spicer*, 1845, overruling *R. v. Loom*, 1827. The decision in *R. v. Loom* was under the repealed Act of 15 G. 2, c. 34, which, like the Act

of 7 & 8 G. 4, c. 29, § 25, specified lambs as well as sheep. In an old Act of 25 H. 8, c. 13, §§ 2, 13, which is now repealed by 19 & 20 V. c. 64, and which prohibited persons from having above 2,000 sheep, it was expressly enacted, that "lambs under the age of one whole year shall not be adjudged for sheep prohibited by the statute." The special insertion of such a clause leads rather to an inference, that, without it, the mention of the grown animal would have included the young. See next note.

be sustained by proof of stealing a gelding, a mare, a colt, or a filly,¹ is by no means clear.

§ 291. When forgery was a capital offence, on prosecutions for that offence great nicety was required in describing the instrument forged. The law, however, is now happily amended, and the punishment for forgery has become less severe but more certain. For the Act of 1861, now governing the law on this subject,² by § 42, enacts that, "in any indictment for forging, altering, offering, uttering, disposing of, or putting off, any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof." A similar laxity of description is permitted, whenever any person is indicted for engraving or making "any instrument, matter, or thing," or for using or unlawfully possessing any plate, material, or paper on which any instrument, matter, or thing shall have been engraved, made, or printed.³

§ 292. Moreover in indictments, too, for offences under the Debtors Act, 1869,⁴ or the Bankruptcy Act, 1883,⁵ it is sufficient to "set forth the substance of the offence charged, in the words of the Act specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceeding in, or order, warrant or document of, any court acting under the Bankruptcy Act, 1883."⁵

§ 293. Generally speaking, *the name of the person injured*,⁶ and, indeed, the name of every person necessarily mentioned in the

¹ Probably it would be good; "horse, mare, gelding, colt or filly" are the words used in 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 10. Under an old Act, which only mentioned "horses, geldings, and mares," proof of stealing a *filly* was held to support an indictment for stealing a *mare*: *R. v. Welland*, 1822.

² 24 & 25 V. c. 98 ("The Forgery Act, 1861"), § 42.

³ *Ibid.* § 43.

⁴ 32 & 33 V. c. 62, § 19; amended by 46 & 47 V. c. 52, § 149, subs. 2.

⁵ 46 & 47 V. c. 52, §§ 31, 163—167. "The Irish Debtors Act, 1872," contains a similar provision. 35 & 36 V. c. 57, § 19, *Ir.*

⁶ See, as to the old law on this subject, *R. v. Biss*, 1838; *R. v. Robinson*, 1817; *R. v. Campbell*, 1843; *R. v. Waters*, 1848; *R. v. Willis*, 1845; *R. v. Stroud*, 1842; *R. v. Sweeny*, 1841 (*Ir.*); *R. v. Smith*, 1833; *R. v. Evans*, 1839; *R. v. Sheen*, 1837; *R. v. Hogg*, 1841.

indictment,¹ is matter of essential description, and formerly it must have been proved with precision. There is, however, little room for doubt that the court would now, in every case of mere *misnomer*,² direct an amendment to be made almost as a matter of course.³ Still a question may occasionally arise as to what the nature of the amendment ought to be, and as to this, the following rules, therefore, may furnish some guide:—1st. If the name of the injured party cannot be proved, it will suffice to describe him as a person “whose name is to the jurors unknown.”⁴ 2nd. It is not necessary to describe a party by what is, in strictness, his right name; but it will be sufficient to state any name he has assumed,⁵ or by which he is generally known, and the omission of a second christian name has been frequently held to be immaterial.⁶ 3rd. An illegitimate child is not entitled to the surname either of the mother or of the putative father, but can only acquire a surname by reputation.⁷ 4th. The proper mode of describing a peer is by his christian name and rank in the peerage; but the christian name may be omitted;⁸ and it seems that under the degree of a duke, a nobleman may be designated by the simple title of “lord.”⁹ 5th. Foreigners of rank may be described by their christian names and foreign titles, provided they be generally known by those appellations;¹⁰ or it will suffice, as it seems, to describe them by

¹ See, as to the old law on this subject, *R. v. Dunmurry*, 1841 (Ir.); *R. v. Walker*, 1811; *R. v. Bush*, 1818.

² See *R. v. Welton*, 1862.

³ Under § 1 of 14 & 15 V. c. 100 (“The Criminal Procedure Act, 1851”), cited ante, § 249.

⁴ See *R. v. Welton*, 1862.

⁵ *R. v. Norton*, 1823. See *R. v. Williams*, 1836. In *R. v. Toole*, 1857, where the only proof of the prosecutor’s christian name was the statement of a witness, who said that he had seen the prosecutor sign the charge against the prisoner, and the deposition before the magistrates, and that the signatures of those documents, which the witness identified, corresponded with the name laid in the indictment, the court held that the evidence was sufficient.

⁶ *Att.-Gen. v. Hawkes*, 1830; *R. v. Berriman*, 1833; *R. v. —*, 1834;

Williams v. Bryant, 1839. But see *R. v. M’Anerney*, 1841 (Ir.) (Cramp-ton, J.).

⁷ *R. v. Waters*, 1835; *R. v. Clark*, 1818.

⁸ *R. v. Frost*, 1855.

⁹ *R. v. Pitts*, 1839, where the prosecutor was described as “George Talbot Rice, Lord Dynevor,” instead of “George Talbot, Baron Dynevor;” *R. v. Elliott*, 1839, where the words were, “The Right Honourable William Fitzhardinge, Lord Segrave,” he being an earl. It seems that “Edward, Bishop of Hereford,” is not a right description: *R. v. Pitts*, supra.

¹⁰ *R. v. Gregory*, 1846, where the prosecutor was held sufficiently described as “Charles Frederick Augustus William, Duke of Brunswick and Luneberg,” his name being Ch. Fr. Aug. Wm. D’Este, and he having ceased to be the reigning Duke: *R. v.*

their christian and surnames, with the addition of the word esquire, that being the title which English courtesy confers on foreign noblemen.¹ 6th. If a parent and child bear the same name, it will suffice in an indictment to describe the latter by that name without the addition of "junior."² And lastly, where joint-stock companies, trustees, or other joint owners have been injured, several Acts of Parliament have been passed, which render it sufficient in such cases to describe in the indictment one person only by name, and to state that the offence has been committed against that person, and another or others, as the case may be.³ The same description⁴ is allowed, under certain circumstances, in informations or complaints before justices of the peace.

§ 294. In some few instances it has been expressly provided by statute that, to justify a conviction, the name of the injured party need neither be alleged nor proved. For instance, on an indictment against a person for any offence against the Act of 1861 relating to malicious injuries to property, it will suffice to allege and prove that the prisoner did the act charged with intent to injure or defraud, and no allegation or proof is necessary that the prisoner intended to injure or defraud any particular person;⁵ the law is the same in prosecutions "for forging, altering, uttering, offering, disposing of, or putting off, any instrument,"⁶ or for obtaining, or attempting to obtain, any chattel, money, or valuable security by false pretences;⁷—and, in this last case, the indictment will be good,⁷ "without alleging any ownership of the chattel, money, or valuable security." Similarly, in indictments for stealing, or fraudulently destroying, or concealing wills,⁸ or for stealing, or fraudulently taking, or maliciously destroying, records

Sulls, 1800, where, in an indictment for larceny, the goods stolen were held to be properly laid as the property of Victory, Baroness Turkheim, the prosecutrix being an Alsatian lady, whose real name was Selina Victoire. In both these cases the parties were well known by the names used.

¹ *R. v. Graham*, 1791.

² *R. v. Peace*, 1820; *R. v. Hodgson*, 1831 (Parke, B.); *R. v. Bland*, 1832 (Bolland, B.); *Sweeting v. Fowler*, 1815; *R. v. Bayley*, 1835. See ante, § 195.

³ 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 14. See, also, 7 G. 4, c. 46 ("The Country Bankers Act, 1826"), § 9.

⁴ 11 & 12 V. c. 43 ("The Summary Jurisdiction Act, 1848"), § 4.

⁵ 24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), § 60. See *R. v. Newbould*, 1872 (C. C. R.).

⁶ 24 & 25 V. c. 98 ("The Forgery Act, 1861"), § 44.

⁷ 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 88.

⁸ *Id.* § 29.

or legal documents,¹ or for stealing fixtures attached to any square, street, or place dedicated to public use or ornament,² it is not necessary to allege that "the article in respect of which the offence is committed is the property of any person."

§ 295. The prisoner's name is not a matter of essential description, because on this subject the prosecutor may have no means of obtaining correct information. Therefore, if it, or his addition, be wrongly described, or the addition omitted, the court may correct the error, and call upon the prisoner to plead to the amended indictment.³

§ 296. The rule that proof must be given of descriptive allegations, which are essential, need not be illustrated with regard to civil actions, because that subject has already been discussed, while examining the cases that have been decided on the Rules authorising amendments.⁴

¹ 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 30.

² *Id.* § 31.

³ 7 G. 4, c. 64 ("The Criminal Law Act, 1826"), § 19. See *R. v. Orchard*, 1838, where a woman charged with

the murder of her husband, being described as "A., the *wife* of B. C.," the record was amended by inserting the word "widow" instead of "wife" (*Ld. Abinger*).

⁴ *Ante*, § 227 et seq.

AMERICAN NOTES.

Relation of Pleading to Evidence. — The rules of pleading exert in certain directions a controlling influence upon the admissibility of evidence. They determine also which party has the onus of convincing the tribunal, to a predetermined extent, of the truth of facts in issue. As the only admissible evidence is that bearing on facts in the issue or relevant to the issue, the issue is an absolute limitation upon the facts provable in any given case. As such, a very natural habit may be noticed on the part of the court to rule that evidence offered to prove facts other than those in issue or relevant thereto, is not admissible to prove such facts; — as if such an exclusion were under some rule of evidence.

The truth, however, frequently is that, in such a case, the evidence offered is excluded not by the rules of evidence, but by those of pleading. Very possibly the evidence offered to prove the fact is perfectly competent by the rules of evidence to prove it if the fact itself were competent. It is not, and therefore evidence to prove it is not admissible. The pleadings have not made the fact as to which evidence is offered relevant, — a circumstance which the rules of evidence themselves have no power to control.

Per contra, a ruling is frequently made that evidence is admissible to prove a certain fact when no possible question has been or could be raised that the evidence is competent to prove the fact in any case where the fact itself would be admissible, and all that such ruling in reality amounts to is a statement that under the pleadings the fact itself can be proved.

The object and function of the pleadings being to bring the parties to an issue of fact upon some one or more material fact or facts affirmed on the one side and denied on the other, it is of importance in any given case to determine what facts are material, for it is only on these that issue can be taken. To ascertain this, namely, what are the material allegations of fact in any case, resort must be had neither to the law of evidence (which decides how a fact in issue may be proved) nor to the law of pleading (which determines what material facts are placed in issue, and how it should properly be done) but to the rules of the branch of the substantive law involved in the case. In other words, what allegations are material in any given matter is a question of positive law; which of these material allegations is placed in issue, is a question of pleading; how such allegation, when placed in issue is to be proved or disproved is a question of evidence. There seems, as has been said, an unfortunate tendency to turn many of the rules of positive law or pleading into rules of evidence simply by saying that evidence is not admissible to prove a certain fact, or that the opposite of it is "conclusively presumed" when

what is meant is that, as a matter of pleading, the fact is not in issue or perhaps, as a matter of positive law, is not material. Or, on the other hand, to rule, as if on a point in the law of evidence, that evidence is admissible to prove a certain fact when what is meant is that, as matter of positive law, the fact is material and that, as a matter of pleading, it has been placed in issue.

That the evidence offered must tend to prove some fact placed in issue by the pleadings, is abundantly sustained by authority.

"It is a settled principle, that no evidence can be admissible, which does not tend to prove or disprove the issue joined." *Hudson v. State*, 3 Cold. 355 (1866). "The principle is, that all the evidence admitted must be pertinent to the point in issue." *Com. v. Choate*, 105 Mass. 451 (1870).

"Evidence was introduced . . . tending to show that the defendant held possession of the property under some other right than under the contract. In so holding the Court erred, for the reason that there was no such issue." *Moline Plow Co. v. Braden*, 71 Ia. 141 (1887).

"The fact that, &c. . . did not tend to prove or disprove the issue joined." *Hawkins v. James*, 69 Miss. 274 (1891).

"The end and purpose of testimony in legal proceedings is to arrive at the truth of the issues between the parties." *Turnbull v. Richardson*, 69 Mich. 400 (1888). "Collateral facts are not admissible. The evidence must be relevant to the issue, that is, to the facts put in controversy by the pleadings." *Nickerson v. Gould*, 82 Me. 512 (1890); *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454, 469 (1875).

Where the issue is not defined, "and where of course, at the time, it is often impossible to anticipate what questions may arise in the course of the trial, the rule in such cases is, that the testimony should be received, if it is competent evidence in any view of the case which may be thereafter taken." *Harris v. Holmes*, 30 pt 352 (1858) per Redfield, C. J.

EVIDENCE ADMITTED DE BENE. — As a party can prove but one fact at a time; and as a strictly logical order of proof, especially when offered by different witnesses, is not always possible, except at great practical inconvenience, courts frequently receive evidence conditionally upon its being connected later; i. e. made relevant and otherwise admissible. "We agree," say the supreme court of Connecticut, "with the defendants' counsel that, as a general rule, no evidence should be admitted till the court can see that it is admissible. Where however the admissibility of evidence depends upon several facts, to some extent independent of each other, and where each fact must be proved to complete the chain of evidence, the exercise of a sound judicial discretion does not require the court, uniformly, to interfere in the order of the testimony. A beginning

must be made somewhere ; and when, as in the present case, the court is satisfied that the party is acting in good faith, and intends fairly to supply each particular link till the chain of testimony is perfect, the evidence, as offered, may come in, subject to objection, to be stricken out and go for nothing if the necessary connecting portion be not supplied." *Moppin v. Ætna Axle, &c. Co.*, 41 Conn. 27 (1874).

Such a ruling, being as to the order in which the evidence may be introduced, is matter of judicial discretion, and therefore not a matter to which an exception may be taken. *Com. v. Dam*, 107 Mass. 210 (1871).

If the condition is not complied with, and the other side does not ask to have it stricken out or disregarded, there is no error on the part of the court in not itself taking action in regard to the matter. *Reeve v. Dennett*, 145 Mass. 23 (1887).

RELEVANCY. — Whether a fact tends to establish the existence or non-existence of a fact in issue is a question of logic. As the views of particular judges naturally differ as to the logical effect of facts, it is not surprising to have the supreme court of Maine say, that "the relevancy of evidence of other facts, as bearing upon the probability or non-probability of the main fact in issue, has been one of the most troublesome questions for the courts to decide." *Nickerson v. Gould*, 82 Me. 512 (1890).

The recognition of a logically probative effect on the issue being a fact preliminary to the receipt of evidence, it is one to be decided by the court. In exercising this discretion, it has been held that where the fact offered in evidence seems to the court to be of but slight probative force, either because too remote in point of time or for other reasons, it is permissible within reasonable limits, for the court to reject it. *Jones v. State*, 26 Miss. 247 (1853); *Morrissey v. Ingham*, 111 Mass. 63 (1872).

This discretion may be reviewed on exceptions and reversed where it appears to have been unreasonably exercised. Thus where a defendant, endeavoring to show that he did not consent to his wife's using her own house, in which he also resided, for an illegal purpose, was confined to his acts during the time covered by the indictment, an exception to this ruling was sustained. "When the question is of the state of mind of a person at or during a particular time, which can only be shown by acts or speech, evidence of what he said or did for a reasonable time before, if it tends to show a permanent or settled state of mind on the subject, has always been admitted." *Com. v. Hill*, 145 Mass. 305 (1887).

Evidence that during ten days immediately prior to the date alleged certain premises were used for the illegal purpose charged in the indictment is competent. *Com. v. Ferry*, 146 Mass. 203 (1888). The issue being whether a party was insane at a certain

time, the court refused to admit evidence of such party's mental state eight months after. "We cannot say that the judge who tried the cause exercised the discretion confided to him erroneously." *Wright v. Wright*, 139 Mass. 177 (1885).

It is not necessary that evidence offered should be sufficient to prove any fact in issue. "If such were its tendency — if it were 'a link in the chain of proof,' it was within the sphere of competency, while its effect was for the consideration of the jury." *Schuchardt v. Allens*, 1 Wall. 359 (1863). "Distinct matters, forming separate links in a connected chain of title, often cannot conveniently be given in evidence together. It is no answer to evidence, that it does not prove the plaintiff's whole case; if it is a link in the chain of the evidence afterwards to be given, it is admissible." *Haughey v. Strickler*, 2 W. & S. 411 (1841); *Tams v. Bullitt*, 35 Pa. St. 308 (1860); *Tucker v. Peaslee*, 36 N. H. 167 (1858); *Com. v. Fenno*, 134 Mass. 217 (1883); *Sanders v. Stokes*, 30 Ala. 432 (1857); *Columbus Omnibus Co. v. Semmes*, 27 Ga. 283 (1859); *Willoughby v. Dewey*, 54 Ill. 266 (1870); *Farwell v. Tyler*, 5 Ia. 535 (1857); *Comstock v. Smith*, 20 Mich. 338 (1870).

"Although, of itself, it may have been weak and inconclusive, yet being derived from a legal source, and pertinent to the issue, the jury was the proper tribunal to pass upon it." *Richardson v. Milburn*, 17 Md. 67 (1860).

AUXILIARY FACTS. — If a fact be admissible, all preliminary and introductory facts necessary to explain it are equally admissible. As Mr. Justice Stephen (Dig. Law. Evid. pt. 1, chap. 2, Art. 8) says, "Facts necessary to be known to explain or introduce a fact in issue or a relevant fact, or which support or rebut an inference suggested by the fact in issue or relevant fact, are relevant in so far as they are necessary for these purposes respectively." Thus the question being whether a lease was verbally surrendered, evidence is competent as to certain dealings between the landlord and tenant as to the quality of certain ale, complaint as to which was the cause and occasion of the alleged surrender. *Wallace v. Kennelly*, 47 N. J. L. 242 (1885).

In contests not held under the rules of the common law, and where, therefore, there are, strictly speaking, no pleadings, the facts in issue are determined by the nature of the investigation, and the burden of producing conviction in the tribunal lies on him who asks the intervention of the court in his favor.

Questions involving the power of the court in the allowance of amendments and relating to the sufficiency of allegations, etc., are, it would seem, too closely related to the statutory procedure of the several states to admit of profitable discussion.

CHAPTER II.

CONFINING EVIDENCE TO POINTS IN ISSUE.

§ 298. WE may now pass to the consideration of the second of the four general rules which have been pointed out¹ as governing the production of evidence. This *second general rule* is, that *the evidence must be confined to the points in issue*. These points having been selected by the parties in their pleadings, as those on which they are respectively willing to rest the fate of the cause,² any evidence, in support of other facts, would be obviously improper. Accordingly, in an action of defamation, where the issues raised by the pleas of justification were whether the plaintiff's scholars were "ill-fed, badly lodged, and covered with vermin," defendant's counsel was not permitted to put any questions to show that the boys were also *badly educated*.³ In another action of the same kind, where the defendant had only pleaded the general issue, Lord Ellenborough would not allow the plaintiff to prove that the assertions contained in the libel were false, observing: "There is no plea of justification on the record, and, therefore, I can no more hear a falsification on the one side than a justification on the other."⁴ Where *to an action in contract* (not founded, be it observed, on any allegation of fraud) the defendant pleaded the Statute of Limitations, to which there was a replication that he did promise within six years, and the plaintiff did not reply fraud to this plea, but simply denied the fact by taking issue on the plea, the plaintiff was not allowed to prove that the action was grounded *on a fraudulent receipt of money by the defendant, and that the fraud was first discovered within six years from the commencement of the suit*;⁵ where the breach of covenant for which the action was

¹ See *supra*, § 217.

² Steph. Pl. 115.

³ *Boldron v. Widdows*, 1824.

⁴ *Stuart v. Lovell*, 1817; *Cornwall v. Richardson*, 1825.

⁵ *Clark v. Hougham*, 1823.

brought was that defendant had not used the plaintiff's farm in a husbandlike manner, but had committed waste, evidence of bad husbandry *not amounting to waste* was rejected.¹

§ 299. The cases just cited were decisions under the old rules of pleading. The new rules (Order XIX. of R. S. C., 1883), are intended to effect three material objects: first, to make each party acquainted with the intended case of his opponent, and thus to prevent either side from being taken by surprise at the trial; secondly, to save the expense of collecting unnecessary evidence; and thirdly, to bring *legal* defences more prominently forward on the face of the record.²

§ 300. Accordingly, it is provided, in general terms, that all pleadings shall henceforth consist, first, of a statement of claim, and of the relief or remedy sought;³ next, of a defence, set-off, or counter-claim;⁴ thirdly, of a reply,⁵ if any; and lastly, of a joinder of issue on the one side or the other.⁶ It is further provided that "such statements shall be as brief as the nature of the case will admit,"⁷ and that "every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies, but not the *evidence* by which they are to be proved."⁸ For example, if an agreement be alleged in any pleading, it is not sufficient to aver generally its existence, and to state its effect, but the party relying on it should state whether it be in writing, or by parol, or the result of a series of documents.⁹ The phrase "material facts" will include any facts which the party pleading is entitled to prove at the trial.¹⁰ Thus, in an action for breach of promise of marriage, the plaintiff may allege in her statement of claim her consequent seduction or infection, these matters being important by way of aggravation.¹¹

§ 301. Twelve other pleading rules have a material bearing on the Law of Evidence. Rule 13 of Order XIX. provides that

¹ Harris v. Mantle, 1789.

² See Isaac v. Farrer, 1836 (Ld. Abinger); Barnett v. Glossop, 1835 (Park and Bosanquet, JJ.); Gutsole v. Mathers, 1836 (Ld. Abinger).

³ Ord. XIX. r. 2.

⁴ Id.

⁵ Id.

⁶ Ord. XIX. r. 18. See post, § 304, also § 829, and Ord. XXVII. r. 13, there cited.

⁷ R. 2.

⁸ R. 4. See Heap v. Marris, 1876; Philipps v. Philipps, 1878, C. A.

⁹ Turquand v. Fearon, 1879, C. A.

¹⁰ Millington v. Loring, 1880, C. A.

¹¹ Id.

“every allegation of fact in any pleading, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be *taken to be admitted*,¹ except as against an infant, lunatic, or person of unsound mind not so found by inquisition.” By Rule 14, “any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be *implied* in his pleading.” Rule 15 provides, that “the defendant or plaintiff, as the case may be, must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law,² and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud,³ the Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds.” By Rule 16, “No pleading, not being a petition or summons, shall,—except by way of *amendment*,⁴—raise any new ground of claim, or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.”

§ 302. By Rule 17, “it shall not be sufficient for a defendant in his statement of defence to deny *generally* the grounds alleged by the statement of claim,⁵ or for a plaintiff in his reply to deny *generally* the grounds alleged in a defence by way of counter-claim,

¹ See *Tildesley v. Harper*, 1878, C. A.; *Harris v. Gamble*, 1878 (Fry, J.); *Rutter v. Tregent*, 1879.

² An exception to this proposition is contained in Ord. XXI. r. 21, which provides, that “no defendant in an action for the recovery of land, who is in possession by himself or his tenant, need plead his *title*, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff.” As to this rule, see *Dan-*

ford v. McAnulty, 1883, H. L.

³ See post, § 306.

⁴ See, also, Ord. XXIII. r. 6, which provides, that “*no new assignment* shall be necessary or used.” But everything which was formerly alleged by way of new assignment may hereafter be introduced by amendment of the statement of claim, or by way of reply. See *Earp v. Henderson*, 1876, as explained by Hall v. Eve, 1876.

⁵ See *Harris v. Gamble*, 1878 (Fry, J.); *Rutter v. Tregent*, 1879.

but each party must deal *specifically* with each allegation of fact of which he does not admit the truth, except damages." Rule 18 provides that, "subject to the last preceding rule, the plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading.¹ Such joinder of issue shall operate as a denial of every material allegation of facts in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted."

§ 303. The general effect of these rules—especially of the two which are last cited—is to do away *in the statement of defence* with what used to be termed by Special Pleaders "the General Issue." Under the old forms of pleading, on an action, which was in form one "*ex contractu*" (or founded on contract), being brought, whenever the defendant could show that no *debt* in fact existed before action brought, he was allowed to do it under the plea of "never indebted." For example, in an ordinary action for *goods sold and delivered*, the defendant might, under the useful plea of "never indebted," show either that they were paid for by ready money;² that they were sold on credit, which was unexpired when the action was commenced;³ that they were bought through an agent, to whom, before the expiration of the credit, the defendant had remitted the price;⁴ that they were sold under a condition, that if they did not answer their purpose nothing should be paid for them, and that in fact they did not answer their purpose;⁵ that they were sold under any special agreement, which had not been performed;⁶ that they were delivered under a contract of barter;⁷ that the goods delivered did not answer the description of the articles which the vendor professed to sell;⁸ or that they turned out to be utterly useless.⁹

¹ As to the effect of not delivering a reply, or any subsequent pleading within the proper period, see Ord. XXVII. r. 13, cited post, § 829.

² *Bussey v. Barnett*, 1842. But see *Littlechild v. Banks*, 1845.

³ *Broomfield v. Smith*, 1836, overruling *Edmonds v. Harris*, 1834.

⁴ *Smyth v. Anderson*, 1849.

⁵ *Grounsell v. Lamb*, 1836. See

Diamond v. Davall, 1847.

⁶ *Broomfield v. Smith*, 1836 (Ld. Abinger); *Garey v. Pyke*, 1839; *Hayselden v. Staff*, 1836; *Mosely v. M'Mullen*, 1856 (Ir.).

⁷ *Harrison v. Luke*, 1845; *Smith v. Winter*, 1852; *Bracegirdle v. Hinks*, 1854.

⁸ *Gompertz v. Bartlett*, 1853.

⁹ *Cousins v. Paddon*, 1835, recog-

§ 303A. A similar multiplicity of defences was open under the plea of “never indebted” in an action for use and occupation. No useful purpose is to be served by mentioning them in detail.

§ 303B. Now, however, the grounds of defence are in *all* cases (in the two above specified, as well as in others), required to be *specifically* set out in the statement of defence.

§ 303c. While in an action founded on contract a great variety of defences was thus permitted to be raised (without any previous notice to the plaintiff as to which of such possible defences the defendant intended to set up), under the “general issue” (or plea of “never indebted”), in an action founded upon tort a similar variety and choice of defences was allowed under a “plea of the general issue,” taking the form of “not guilty.” The effect of such a plea is learnedly discussed in Bullen on Pleading.¹ By the Pleading Rules of 1853 the operation of such a plea was considerably restricted. But even after the passing of these rules the plea of “not guilty” had still, in some cases, a wide operation; for instance, in actions for fraud, its operation was to deny that the defendant made the representation charged, that it was false, that he made it either knowing it to be false, or even without a belief in its truth, that he made it with the intent to induce the plaintiff to act upon it, that the plaintiff did act upon it, and also that the plaintiff sustained damage in consequence of so doing.² Again, in respect of slander for words not actionable in themselves, but which are so only by reason of special damage caused by them, a plea of “not guilty” denied the speaking of the words, the speaking of them maliciously, their use in the defamatory sense imputed, and the alleged special damage.³

§ 304. The general issue is, by the rules at present in force under the Judicature Act, forbidden to be raised by a statement of defence. But it will be observed that, by Rule 18 of Order XIX., it is still allowed to be contained in the plaintiff’s reply, the rule saying that the plaintiff “by his reply *may* join issue upon the defence.”⁴ The

nised by *Ld. Denman in Hayselden v. Staff*, 1836; *Baillie v. Kell*, 1858; *Chapel v. Hicks*, 1833; *Allen v. Cameron*, 1833. These cases over-rule *Roffey v. Smith*, 1834.

¹ 3rd edit. pp. 697 et seq.

² Bullen on Pleading, ubi supra, p. 701.

³ *Wilby v. Elston*, 1849.

⁴ See ante, § 302.

rule in question does not mean that the plaintiff *must* take that course. He may—except in a case where, under the old system of common law pleading, a new assignment would have been necessary,¹—either amend his claim under Order XXVIII., or traverse the allegations in the defence generally or specially, or confess and avoid them, or unite in one reply those several answers.²

§ 305. Thus the whole object of the present system of pleading is to narrow the parties to definite and distinct issues, and thereby to diminish expense and delay, especially as regards the amount of oral testimony required on either side at the trial.³

§ 306. This object is further sought to be attained by the help of various rules besides those which have already been cited. Thus Order XIX., r. 20, provides, that “when a contract, promise, or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the *legality* or *sufficiency in law*, of such contract, promise, or agreement, whether with reference to the *Statute of Frauds* or otherwise.” The effect of this rule is, that, whenever a party intends to rely on the illegality or insufficiency in law of any contract, whether with reference to the Statute of Frauds, or otherwise, he must *specially* plead such illegality or insufficiency, and it will not be sufficient to traverse allegations made by his opponent in anticipation of objections to the contract upon such grounds.⁴ Neither can a defendant avail himself of the Statute of Frauds by simply raising in general terms by his pleading a point of law⁵ (the substitute for the old general demurrers⁶), nor will it suffice for him to state generally that he relies on a statute, but the facts which make the statute applicable must distinctly appear on the pleadings.⁷

§ 307. Again, Rule 5 of Order XXI., provides, that “if either party wishes to deny the right of any other party to claim as

¹ See ante, p. 221, n. ⁴.

² Hall v. Eve, 1876, C. A.

³ Thorp v. Holdsworth, 1876 (Jessel, M.R.); Byrd v. Nunn, 1877, C. A.; Tildesley v. Harper, 1878, C. A.; Collette v. Goode, 1877 (Fry, J.).

⁴ Clarke v. Callow, 1876, C. A.

⁵ Fitcher v. Fitcher, 1881 (Fry, J.).

⁶ Ord. XXV. rr. 1, 2.

⁷ Pullen v. Snelus, 1879.

executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or other alleged capacity, or the alleged constitution of any partnership firm, he shall deny the same specifically.”

§ 308. Sometimes it will be difficult to reconcile this last rule, and also Rule 13 of Order XIX.,¹ with certain express enactments. For example, if in an action on a doctor's bill the statement of claim allege that plaintiff is a “legally qualified medical practitioner,”² an omission to specifically deny this statement amounts to an admission of the fact. But the Medical Act of 1858³ expressly enacts that “no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall *prove* upon the trial that he is registered under the Act.” Yet it cannot be that a quack doctor, who must inevitably be nonsuited in any county court, would have a fair chance of recovering his charges, if he sues in the High Court.

§ 309. Again, it would appear to follow that the objection that an instrument is *not stamped*, or is insufficiently stamped, cannot be taken at the trial by a party who has not relied on that point in his pleading.⁴ But when the document is offered in evidence, these pleading rules do not affect the steps which must be taken either by the presiding judge, or by the ministerial officer of the court, to protect the interests of the Revenue.

§ 310. Moreover, the question how far a defendant can avail himself of want of jurisdiction in the court without raising that defence by means of a special plea, does not seem to have been set at rest by the rules of pleading under the Judicature Act, and is in an unsatisfactory state.⁵

¹ Cited ante, § 301.

² See 21 & 22 V. c. 90, § 34.

³ Id. § 32.

⁴ See, as to the old law, *Field v. Woods*, 1837; *Dawson v. Macdonald*, 1836; *M'Dowall v. Lyster*, 1836. See, also, post, § 397.

⁵ See *Spooner v. Juddow*, 1848-50, P. C., where the Privy Council decided, that when the facts ousting the juris-

diction are brought by the plaintiff himself to the notice of the court, the mere omission of the defendant to plead specially will not give the court jurisdiction over the suit, but it will be bound, whatever be the nature of the issues raised, either to nonsuit the plaintiff, or to direct a verdict for the defendant, but declined to state what would be the

§ 311. The numerous cases in which a defendant is expressly empowered to plead "*Not Guilty by statute*," and to give special matter in evidence under such plea, are not affected by the present pleading rules further than this, that the party who intends so to plead cannot "plead any other defence to the same cause of action without the leave of the court or a judge;"¹ and must "insert in the margin of his pleading the words 'By Statute,' together with the year of the reign in which the Act of Parliament on which he relies was passed, and also the chapter and section of such Act, and specify whether such Act is public or otherwise; otherwise such defence shall be taken not to have been pleaded by virtue of any Act of Parliament."²

§ 312. Under this form of general issue a defendant may sometimes give special matter in evidence so as to be entitled to rely upon the want of notice of action, or a tender of amends, or on some other special protection given by a particular Act of Parliament. But when such a privilege as this is claimed by virtue of having *acted in an office*, or under a statute, it is extremely difficult to lay down, as an abstract proposition of law, what amounts to such an *acting in pursuance of the statute*, or *in the execution of the office*, as to entitle the defendant to the protection of the statute.³ This much, however, may safely be stated, that if a party believes, *bonâ fide*, in the existence of a state of *facts*,⁴ which, if they had existed, would have afforded a defence to the action,⁵ he is,—without reference to the reasonableness of such belief,⁶—entitled to pro-

law, if the plaintiff were to close his case without betraying the want of jurisdiction, and the defendant were then, without any special plea raising the point, to offer evidence of facts with a view of showing that the cause of action was *ultra vires*.

¹ Ord. XIX. r. 12.

² Ord. XXI. r. 19.

³ See *Arnold v. Hamel*, 1854; and *Kirby v. Simpson*, 1854, where a magistrate, acting in execution of his office maliciously and without reasonable and probable cause, was held entitled by 11 & 12 V. c. 44 ("The Justices' Protection Act, 1848"), § 9 (now repealed by 57 & 58 V. c. 56), to notice of action.

⁴ If there are no facts on which a *bonâ fide* belief can reasonably be founded, the protection will not apply: *Agnew v. Jobson*, 1878.

⁵ *Hermann v. Seneschal*, 1862; *Heath v. Brewer*, 1864; *Mid. Ry. Co. v. Withington Local Board*, 1883, C. A.; *Roberts v. Orchard*, 1863. See *Downing v. Capel*, 1867; *Selmes v. Judge*, 1871.

⁶ *Chamberlain v. King*, 1871. Prior to this decision, it was thought by many that the belief, to be available, must have rested "on some colour of reason." See *Cann v. Clipperton*, 1839; *Cook v. Leonard*, 1827, as qualified in *Jones v. Gooday*, 1842. See, also, *Kine v. Evershed*, 1847;

tection, although he may have proceeded illegally or exceeded his jurisdiction.¹ Statutes of this kind are intended for the protection of honest persons, who *bonâ fide* mean to discharge their duty;² and the court will, consequently, so interpret their provisions, as to save harmless all persons who act illegally under the reasonable belief that they are authorised in what they do by Act of Parliament; and this, too, whether the error complained of has been committed in respect of *time, place, or circumstance*.³

§ 313. Under a plea of "*Not Guilty by statute*," a defendant may, too, clearly set up any defence that could be specially pleaded, whether it be founded wholly or partly on the statute, or be merely sustainable at common law.⁴ For example, in an action for an excessive distress, such a plea puts in issue not only the matter of justification, but the tenancy and the ownership of the goods.⁵ This being the case, the courts will not, in general, allow a defendant to plead "*not guilty by statute*," together with any other defence; but if a reasonable doubt exists as to whether the defendant, in regard to the particular act complained of, is entitled to such a plea, the rule will, in favour of substantial justice, be sometimes relaxed.⁶

§ 314. It may be added in connection with this subject that⁷ so much of any clause or provision in any Act commonly called Public local and personal, or Local and personal, or in any Act of a local and personal nature,⁸ whereby any party was entitled,

Leete *v.* Hart, 1868; Spooner *v.* Juddow, 1848-50, P. C. (Ld. Campbell); Booth *v.* Clive, 1851; Read *v.* Coker, 1853; Arnold *v.* Hamel, 1854; Hermann *v.* Seneschal, 1863.

¹ Hazeldine *v.* Grove, 1842; Spooner *v.* Juddow, 1848-50, P. C.; Jones *v.* Gooday, 1842 (Parke and Alderson, BB.); Theobald *v.* Crichmore, 1818 (Ld. Ellenborough, and Bayley, J.). See, further, Eliot *v.* Allen, 1845; Shatwell *v.* Hall, 1842; Hopkins *v.* Crowe, 1836; Lidster *v.* Borrow, 1839; Bush *v.* Green, 1837; Smith *v.* Shaw, 1829; Davis *v.* Curling, 1845; Cox *v.* Reid, 1849; Thomas *v.* Stephenson, 1853; Newton *v.* Ellis, 1855; Poulsum *v.* Thirst, 1867.

² Per Parke, B., in Jones *v.* Gooday, 1842.

³ Hughes *v.* Buckland, 1846 (Pollock, C.B.); Horn *v.* Thornborough, 1849.

⁴ Ross *v.* Clifton, 1841; Maund *v.* Monmouth Can. Co., 1842 (Cresswell, J., stating the general opinion of the judges); Fisher *v.* Thames Junc. Ry. Co., 1837; Haine *v.* Davey, 1836; Eagleton *v.* Gutteridge, 1843 (Parke, B.).

⁵ Williams *v.* Jones, 1841. Formerly it also enabled a defendant to dispute the character in which plaintiff sued: Tharpe *v.* Stallwood, 1843 (Cresswell, J.). But see, now, Ord. XXI. r. 5, set out at § 307.

⁶ Langford *v.* Woods, 1844.

⁷ By 5 & 6 V. c. 97, § 3.

⁸ As to the meaning of this phrase, see Richards *v.* Easto, 1846; Cock *v.*

before the 10th of August, 1842, to give special matter in evidence under the general issue, is repealed. The Irish Common Law Procedure Act of 1853,¹ also repeals, by § 69, "so much of any Act of Parliament as entitles or permits any person to plead the general issue only, and to give special matter in evidence without pleading the same." Unfortunately a similar clause is not to be found in either of the English Common Law Procedure Acts; and the pleader is consequently still left to discover, as best he may, in what cases the defendant may or may not avail himself of this indefinite and comprehensive form of pleading.

§ 315. It will be recollected that a general protection to public authorities is, in lieu of the plea of "Not Guilty," now afforded by the provisions of the Public Authorities Protection Act, 1893,² within which is included every *justice* of the peace, sued for anything done by him in the *execution of his office*.³ There are, however, still in existence various statutes empowering defendants to plead the general issue, and to tender or pay into court amends for the injury complained of. In many of these (but not in all of them⁴) it is expressly enacted that tender of amends or payment into court shall be specially pleaded.⁵

§ 315A. The general rule of law, as stated above,⁶ which limits proof to the matters put in issue by the pleadings, has been supplemented by express enactment, as regards actions for infringement of patents, by the Patents, Designs, and Trade-marks Act, 1883.⁷

Gent, 1843; Barnett v. Cox, 1847; Pilkington v. Riley, 1849; Shepherd v. Sharp, 1856.

¹ 16 & 17 V. c. 113, Ir.

² 56 & 57 V. c. 61, ante, § 73.

³ See 56 & 57 V. c. 61 ("The Public Authorities Protection Act, 1893"), ante, § 73A; and on the construction of a repealed Act (11 & 12 V. c. 44, s. 9), see Kirby v. Simpson, 1854, cited ante, notes to § 312.

⁴ See, e.g., "The Seaman's Clothing Act, 1869" (32 & 33 V. c. 57), § 6; and, also, 11 G. 2, c. 19 ("The Distress for Rent Act, 1737"), §§ 20, 21; amended by "The S. L. Rev. Act, 1888" (51 V. c. 3).

⁵ See 45 & 46 V. c. 50 ("The Municipal Corporations Act, 1882"),

§ 226, subs. 2.

⁶ In §§ 298 et seq.

⁷ 46 & 47 V. c. 57. § 29 of this Act provides as follows:—

"(1.) In an action for infringement of a patent the plaintiff must deliver with his statement of claim, or by order of the court or the judge, at any subsequent time, particulars of the breaches complained of.

"(2.) The defendant must deliver with his statement of defence, or, by order of the court or a judge, at any subsequent time, particulars of any objections on which he relies in support thereof.

"(3.) If the defendant disputes the validity of the patent, the par-

§ 316. The rule confining evidence to the points in issue not only precludes the litigant parties from proving any facts not distinctly controverted by the pleadings, but it limits the *mode* of proving even the issues themselves. Thus,¹ it excludes all evidence of *collateral facts*, which are incapable of affording any reasonable presumption as to the principal matters in dispute. The reason is, that such evidence tends needlessly to consume the public time, to draw away the minds of the jurors from the points in issue, and to excite prejudice and mislead; while the adverse party, having had no notice of such evidence, is not prepared to rebut it. The due application of this rule will occasionally tax to the utmost the firmness and discrimination of the judge; so that while he shall reject, as too remote, every fact which merely furnishes a fanciful analogy or conjectural inference, he may admit as relevant the evidence of all those matters which shed a real, though perhaps an indirect and feeble, light on the question in issue. The circumstances of the parties to the suit, and the position in which they stood² when the matter in controversy occurred, are generally proper subjects of evidence; and, indeed, the change in the law enabling parties to give testimony for themselves, has rendered this proof of "*surrounding circumstances*" still more important than it was in former times.³ Accordingly, in an action for money lent, the poverty of the alleged lender is a very relevant fact, evidence of which is admissible for the purpose of disproving the loan.⁴

§ 317. The most important facts which are excluded on the ground of *irrelevancy*, are the acts and declarations, either of

particulars delivered by him must state on what grounds he disputes it, and, if one of those grounds is want of novelty, must state the time and place of the previous publication or user alleged by him.

"(4.) At the hearing no evidence shall, except by leave of the court or a judge, be admitted in proof of any alleged infringement or objection, of which particulars are not so delivered.

"(5.) Particulars delivered may be from time to time amended, by leave of the court or a judge.

"(6.) On taxation of costs, regard shall be had to the particulars de-

livered by the plaintiff and by the defendants; and they respectively shall not be allowed any costs in respect of any particular delivered by them, unless the same is certified by the court or a judge to have been proven, or to have been reasonable and proper, without regard to the general costs of the case."

¹ Gr. Ev. § 52, in part for six lines.

² See *Woodward v. Buchanan*, 1870.

³ *Dowling v. Dowling*, 1860 (Ir.) (Pigot, C.B.).

⁴ *Dowling v. Dowling*, 1860 (Ir.).

strangers, or of one of the parties to the action in his dealings with strangers. These, in technical language, are denominated "*res inter alios actæ*."

§ 318. A good example of matters being excluded for irrelevancy, and as "*res inter alios actæ*," is that in an action to recover goods by his assignees against a bankrupt's creditor, proof of the commission of acts of bankruptcy, by showing that *other* goods which, about the same time, had been delivered to other creditors before the goods in dispute came into defendant's hands, had been got back from them, was rejected. It was suggested that the conduct of such other creditors bore upon the case which was being tried, as it showed the conviction of the other creditors that they had received the goods under circumstances which did not entitle them to keep possession. But as their opinions, expressed after the fiat, could not have been received as evidence, so also evidence of their acts, adduced for the purpose of raising an inference respecting the previous intentions, either of themselves or of the bankrupt, was inadmissible.¹ To return, proof of the usage of a particular estate, however extensive it may be, is inadmissible for the purpose of importing into the lease of a farm on that estate some special stipulations relative to the mode of cultivation;² on a question between landlord and tenant, whether rent be payable quarterly or half-yearly, evidence of the mode in which other tenants of the same landlord pay their rent is rejected;³ and where it was necessary for a brewer to prove that he had supplied a publican with good beer, other publicans were not allowed to show that, during the same period as the dealing in question, he had furnished them with beer of an excellent quality, for a man may deal well with some of his customers, though not with others.⁴

§ 319. Again, where the issue is whether the plaintiff's scholars have been ill-fed, although evidence is admissible to show the *general* treatment of boys at schools, a witness may not be asked as to the comparative quality of the provisions supplied by the plaintiff with those consumed in a *particular* school;⁵ in an action

¹ Backhouse v. Jones, 1839.

² Womersley v. Dally, 1857.

³ Carter v. Pryke, 1791 (Ld. Kenyon).

⁴ Holcombe v. Hewson, 1810 (Ld.

Ellenborough). See, also, Hollingham v. Head, 1856; Rew v. Hutchins, 1861; Howard v. Sheward, 1866.

⁵ Boldron v. Widdows, 1824 (Abbott, C.J.).

against a married woman, where there is an issue whether she had represented herself to the plaintiff as a feme sole, and he had dealt with her as such, evidence of the defendant's dealings with other tradesmen is only admissible, if at all, on the ground that she had held herself out to others as a single woman in such a manner as to reach plaintiff's ears;¹ in an action by the indorsee against the acceptor of a bill, where the defence is that the acceptance is a forgery, evidence that a collection of bills, on which the defendant's acceptance was forged, had been in plaintiff's possession, and that some of them had been circulated by him, was rejected, as no distinct proof was given that the bill in question had *ever formed part of that collection*.² But in an action for a nuisance to a highway by placing a heap near it, evidence that *other* horses (as well as plaintiff's) had shied at it goes to prove that that particular heap is a nuisance, and such evidence is accordingly admissible.³

§ 320. The two cases last cited point us to an *exception* to the rule under discussion, which is, that evidence of facts which, though collateral, are proved to be *connected* by some general link with the matter in issue, is admissible. There are numerous other instances of the recognition of this exception. Thus, although the *customs* of one *manor* usually cannot be given in evidence to prove the customs of another,⁴ yet such customs become evidence the moment that a foundation has been laid for their admission, by clear proof of a sufficient connection between the two manors. The mere fact that two manors lie within the same parish and leet, nor even that the one was a subinfeudation of the other, will not be sufficient; at least, unless it be clearly shown that they were separated after the time of legal memory, since otherwise they may have had different immemorial customs.⁵ If, however, it can be satisfactorily

¹ *Barden v. Keverberg*, 1837. See *Smith v. Wilkins*, 1833, where, the question being whether credit was given to defendant's wife or to her father, evidence that other tradesmen had given credit to the father was rejected by Tindal, C.J. Also *Dela-motte v. Lane*, 1840.

² *Griffiths v. Payne*, 1839; *Thompson v. Mosely*, 1833 (Ld. Lyndhurst); *Viney v. Barss*, 1795 (Ld. Kenyon); *Balcetti v. Serani*, 1792 (Buller, J.).

Such evidence would be clearly inadmissible in an indictment for forgery (Ld. Denman).

³ *Brown et ux v. Eastern Counties Ry.*, 1889, C. A.

⁴ *M. of Anglesey v. Ld. Hather-ton*, 1842 (Ld. Abinger); *Furneaux v. Hutchins*, 1778; *Doe v. Sisson*, 1810.

⁵ *M. of Anglesey v. Ld. Hather-ton*, 1842.

proved that the customs in the two manors are identical, or that the one was derived from the other after the time of Richard the First, then the customs of each will respectively become evidence.¹ Moreover, whenever the custom in question is as to a particular incident of a general tenure proved to be common to the two manors, evidence may be given of what the custom of the one is as to that tenure for the purpose of showing what is the custom of the other as to the same.² For instance, prove in a particular manor that borough English or gavelkind prevails, and then you may see from other manors what are the peculiarities of these tenures.³

§ 321. Similarly, in the manors on the border between Scotland and England,⁴ a particular species of tenure, called tenant-right, and in the manors in the mining districts of Derbyshire and Cornwall, particular customs, as to the rights of the miners and the rights to the minerals, prevail. If in one of these no example can be adduced of what is the custom in any particular case, in order to explain the nature of the tenure or right in question, evidence is admissible to show what is the general usage with respect to that tenure or right.⁵

§ 322. Accordingly, too, upon a question whether the Crown, in right of the Duchy of Lancaster, had the exclusive privilege, under an original charter, of appointing a coroner within the honour of Pontefract, evidence of appointments of coroners, and of their acting, in other parts of the same duchy, was admitted.⁶ On the same principle, the mode of conducting a particular branch of trade in one place may be proved by showing the manner in which the same trade is carried on in another place.⁷ And, where there is a dispute as to the exact line of boundary between manors, evidence that the alleged boundary is a *natural* one, and bounds one of the manors from certain other manors (not the subjects of controversy) is admissible, because the boundary being a *natural* one, equally

¹ *M. of Anglesey v. Ld. Hatherton*, 1842 (Alderson, B.).

² *Id.*; *Stanley v. White*, 1811 (Ld. Ellenborough); *R. v. Ellis*, 1813 (id.); *D. of Somerset v. France*, 1727; *Champion v. Atkinson*, 1672; explained (Rolfé, B.) in *M. of Anglesey v. Ld. Hatherton*, 1842.

³ *M. of Anglesey v. Ld. Hatherton*,

1842 (Rolfé, B.).

⁴ *Rowe v. Parker*, 1792 (Ld. Kenyon).

⁵ *M. of Anglesey v. Ld. Hatherton*, 1842 (Ld. Abinger); *Rowe v. Brenton*, 1828.

⁶ *Jewison v. Dyson*, 1842. See *Fleet v. Murton*, 1871.

⁷ *Noble v. Kennoway*, 1780,

suitable in both cases, it is highly unlikely to have been varied.¹

§ 323. Where, too, the question is whether a slip of waste land, lying between the highway and the enclosed lands of the plaintiff, belongs to him, or to the lord of the manor,—the lord may give evidence of acts of ownership on other parts of the waste land between the *same* road and the enclosures of other persons, although at the distance of two miles from the spot in dispute, and although the continuity of the waste be interrupted.² Again, where, in trespass, the plaintiff's object is to prove himself owner of the entire bed of a river flowing between his land and that of the defendant, and thus rebut the presumption that each party is entitled *ad medium filum aquæ*,³ he may give evidence of acts of ownership exercised by himself upon the bed and banks of the river lower down the stream on the defendant's side, where the *same* river flows between the plaintiff's land and the farm of a third party, or of repairs done, beyond the limits of the defendant's land, to a fence dividing defendant's and other land from the river, which runs for a considerable distance along the side of the stream, till at last it comes actually opposite to the extremity of the plaintiff's property on the other side.⁴

¹ *Brisco v. Lomax*, 1838.

² *Doe v. Kemp*, 1831, recognized (Parke, B.) in *Jones v. Williams*, 1837; *Bryan v. Winwood*, 1808; *Dendy v. Simpson*, 1856.

³ *Ante*, § 119.

⁴ In *Jones v. Williams*, 1837, Parke, B., observes:—"I think the evidence offered of acts in another part of one continuous hedge, and in the whole bed of the river, adjoining the plaintiff's land, was admissible in evidence, on the ground that they are such acts as might reasonably lead to the inference that the entire hedge and bed of the river, and, consequently, the part in dispute, belonged to the plaintiff. Ownership may be proved by proof of possession, and that can be shown by acts of enjoyment of the land itself; but it is impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed; *evid-*

dence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question, as would raise a reasonable inference in the minds of the jury, that the place in dispute belonged to the plaintiff if the other parts did. In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same enclosure; for the ownership of one part causes a reasonable inference that the other belongs to the same person; though it by no means follows as a necessary consequence, for different persons may have balks of land in the same enclosure; but this is a fact to be submitted to the jury. So, I apprehend, the same rule is applicable to a wood which is not enclosed by any fence: if you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole

§ 324. The same principle applies to the case of mines. Therefore, on a claim founded upon a demise of all mines and minerals under a large contiguous area, evidence of working under one part of the surface is evidence of possession of the entire subject of demise.¹

§ 325. In cases, as those above referred to, it is for the judge to decide,² whether such an unity of character exists between the spot in dispute and the parcel of land over which acts of ownership have been exercised, as to lead to the fair inference that both are subject to the same rights, and constitute in fact but parts of an entire property. If no such inference can be raised, evidence of acts done beyond the limits of the locus in quo will be inadmissible. For example, where it was attempted to connect parcels of waste land with each other, by merely showing that they all lay within the same manor, and between enclosures and public roads, evidence of acts of ownership over some of these lands was held inadmissible to prove title to the others.³

wood, although there be no fence, or distinct boundary surrounding the whole; and the case of *Stanley v. White*, 1811, I conceive, is to be explained on this principle: there was a continuous belt of trees, and acts of ownership on one part were held to be admissible to prove that the plaintiff was the owner of another part, on which the trespass was committed. So I should apply the same reasoning to a continuous hedge; though no doubt the defendant might rebut the inference that the whole belonged to the same person, by showing acts of ownership on his part along the same fence. It has been said in the course of the argument, that the defendant had no interest to dispute the acts of ownership not opposite his own land; but the ground on which such acts are admissible is not the acquiescence of any party: they are admissible of themselves *proprio vigore*, for they tend to prove that he who does them is the owner of the soil; though if they are done in the absence of all persons interested to dispute them, they are of less weight." See, also, *R. v. Brightside*, *Bierlow*, 1849; *Peardon v. Underhill*,

1850; *Donegall v. Templemore*, 1858 (Ir.) (Christian, J.); and *In re Belfast Dock Act*, 1866-7 (Ir.).

¹ *Taylor v. Parry*, 1840 (Tindal, C.J.).

² *Doe v. Kemp*, 1831 (Bosanquet, J.); ante, § 24.

³ *Doe v. Kemp*, 1835. *Id.* Denman, in giving judgment, observes, "If the lord has a right to one piece of waste land, it affords no inference, even the most remote, that he has a right to another, in the same manor, although both may be similarly situated with respect to the highway; assuming that all were originally the property of the same person, as the lord of the manor, which is all that the fact of their being in the same manor proves, no presumption arises from his retaining one part in his hands that he retained another; nor, if in one part of the manor the lord has dedicated a portion of the waste to the use of the public, and granted out the adjoining land to private individuals, does it by any means follow, nor does it raise any probability, that in another part he may not have granted the whole out to private individuals,

§ 326. The rule that evidence must be strictly confined to the points in issue (as limited in the manner above stated), applies with even greater force to *criminal* than to civil proceedings. An indictment should afford distinct information to the prisoner of the specific charge about to be brought against him. Therefore, the admission of any evidence of facts unconnected with that charge, and relating to acts alleged to have been done at a different time or place, would be clearly open to the serious objection of taking the prisoner by surprise. No man should be bound, at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life. Few even of the best of men would choose to submit to such an ordeal.¹ Consequently, if on an indictment for burglariously entering a house on a certain day and stealing goods therein, the prosecutor fail in proving that any larceny was committed on that occasion, he cannot abandon the charge of burglary, and then proceed to show that the prisoner stole some of the articles mentioned in the indictment on a *previous* occasion; because, though time is not usually a material allegation, yet the prisoner, having been led to suppose that he was to meet a charge of burglary, cannot be expected to come prepared to prove his innocence with respect to a distinct offence, said to have been committed at a totally different time.² Accordingly, too, an admission by a prisoner that he has, *at another time*, committed an offence similar to that with which he is charged, and has a tendency to perpetrate such crimes, cannot be received.³ Thus, on a charge of *treason*, no overt act amounting to a distinct independent charge, though falling under the same head of treason, can be given in evidence, unless it be either itself expressly alleged in the indictment, or be direct proof of some or one of the overt acts which are there laid.⁴

and they afterwards have dedicated part as a public road. But the case is very different with respect to those parcels, which from their local situation may be deemed parts of one waste or common; acts of ownership in one part of the same field, are evidence of title to the whole; and the like may be said of similar acts on part of one large waste or common." See, also, *Tyrwhitt v. Wynne*, 1819; *Hollis v. Goldfinch*, 1823

(Bayley, J.).

¹ Fost., C. L. 246. Note the distinction between such cases and those where a charge necessarily involves some other distinct offence to have been committed *at the same time and place*, as to which, see ante, §§ 265 *et seq.*

² *R. v. Vandercomb*, 1796.

³ *R. v. Cole*, 1810 (by all the judges).

⁴ 7 W. 3, c. 3 ("The Treason Act,

§ 327. When, however, several *felonies* are so connected together as to form part of one entire transaction, an exception to the general rule that collateral facts must be excluded arises, similar to that which prevails in civil cases,¹ and evidence of one felony may be given to show the character of the other.² Thus, on an indictment for stealing 6s. from a till, evidence was received that on one occasion, when the till contained marked silver and other money, amounting in all to 12s. 6d., the prisoner went to it, and it was afterwards found to contain 11s. 6d. only, and that on subsequent examinations of the till the money was perceived to have gradually diminished, and that, on the prisoner being searched, 8s. of the marked money was found on his person; for though each taking was a separate felony, they were all so connected together as mutually to illustrate and prove each other.³ So where the lessee of a coal-mine had run levels from his own shaft into his neighbours' mines, and had, during a period of four years, been constantly extracting coal belonging to thirty different proprietors, an indictment charging him in one and the same count with stealing the coal of each of these proprietors was held valid; and the judge refused to make the prosecutor elect on which case he would rely, but allowed him to give evidence in support of all the charges, as at least furnishing proof of a felonious intent.⁴

§ 328. Again, where four indictments against a woman respectively charged her with poisoning her husband and two of her sons, and with attempting to poison a third son, on the trial of the first indictment evidence was admitted that arsenic must have been taken by the three sons a few months after their father's death; that all the four parties, when taken ill, exhibited the same symptoms; and

1695"), § 8, as explained in *Fost., C. L.* 245; citing *Ambrose Rookwood's case*, 1696; *Lowick's case*, 1696; *Layer's case*, 1722; *Deacon's case*, 1746; and *Wedderburne's case*, 1746. Accordingly, on an indictment for adhering to the King's enemies on the high sea, where the overt act laid was the prisoner's cruising on the King's subjects in a vessel called the *Loyal Clencarty*, evidence, without anything to connect it with the overt acts for which he was being tried, that he had some time before cut

away the custom-house barge, and gone a cruising in her, was rejected: *Vaughan's case*, 1696.

¹ As to which, see *supra*, §§ 320—325.

² *R. v. Ellis*, 1824 (*Bayley, J.*); *Roupell v. Haws*, 1863; *R. v. Rear-den*, 1864 (*Willes, J.*).

³ *R. v. Ellis*, 1826.

⁴ *R. v. Bleasdale*, 1848 (*Erle, J.*). See *R. v. Firth*, 1869, where the prisoner was indicted for stealing gas: *R. v. Henwood*, 1870.

that the woman, who had lived in the same house with her husband and children, had been in the habit of preparing their meals, such evidence going to prove, first, that the husband (the subject of the indictment that was then being tried) died of arsenic, and next, that his death had not been accidental.¹ Where, too, a man committed three burglaries in one night, and left at one of the houses property taken from another, the three felonies were considered so connected that the court could hear the history of all;² and similar evidence was received where a prisoner was charged on three indictments with firing three stacks belonging to separate parties, within sight of each other, which had all been set on fire at about the same time.³

§ 329. In connection with the principle that *criminal* cases are governed by the general rule that evidence of collateral facts cannot be given *except* where it is shown to be immediately connected in some way with the transaction which is the immediate subject of the inquiry, we may usefully, with this first exception to such general rule,⁴ consider the special rules of law, called the *doctrine of election*, by which the application of this exception is limited.

§ 329A. Now, in point of law, no objection can be raised, either on demurrer or in arrest of judgment, though the defendant or defendants be charged in different counts of an indictment with different offences of the same kind.⁵ Indeed, on the face of the record, every count purports to be for a separate offence,⁶ and in misdemeanors it is the daily practice to receive evidence of several libels, several assaults, several acts of fraud, and the like, upon the same indictment.⁷ In cases of felony, however, this rule

¹ *R. v. Geering*, 1849 (Pollock, C.B., after consulting Alderson, B., and Talfourd, J.); *R. v. Flanagan*, 1882 (Brett, J.); *R. v. Garner*, 1864 (Willes, J., and Pollock, C.B.); *R. v. Cotton*, 1873 (Archibald, J., and Pollock, B.); *R. v. Roden*, 1874 (Lush, J.); *R. v. Heesom*, 1878 (id.). See post, § 340. But see *R. v. Winslow*, 1860 (Martin and Wilde, BB.).

² Cited by *Ld. Ellenborough* in *R. v. Wylie*, 1804; *R. v. Stonyer*, 1843 (*Wightman*, J.). See, also, *Alison*, Cr. L. 313, 314, and *Wills*, Cr. Ev.

58—60, for remarkable cases of a similar nature which occurred in Scotland.

³ *R. v. Long*, 1833 (Gurney, B.); *R. v. Cobden*, 1862 (Bramwell, B.).

⁴ As to other exceptions, see *infra*, §§ 335 et seq.

⁵ *R. v. Kingston*, 1806; *R. v. Jones*, 1809 (*Ld. Ellenborough*). As to election in civil cases, see *Howard v. Newton*, 1843.

⁶ *Young v. R.*, 1789 (Buller, J.).

⁷ *R. v. Jones*, 1809 (*Ld. Ellenborough*); *R. v. Levy*, 1819. See,

has, from motives of humanity, been considerably modified. As an indictment containing several distinct charges is calculated to embarrass a prisoner in his defence, the judges are accustomed to quash indictments so framed, when it appears, before the prisoner has pleaded and the jury are charged, that the inquiry is to include separate crimes. When, however, this circumstance is discovered during a trial, the prosecutor is usually called upon to elect one felony, and to confine himself to that,¹ unless the offences, though in law distinct, seem to constitute in fact but parts of one continuous transaction, in which latter event an "election" will not be enforced.²

§ 330. For instance, in general if a prisoner be charged with knowingly receiving several stolen articles, and it be proved that they were received at separate times, the prosecutor may be put to his election. But if it be possible that all the goods may have been received at one time, he cannot be compelled to abandon any part of the accusation.³ The court, too, refused to put the prosecutor to an election, but heard the whole story, in a case where several prisoners were charged in different counts of the same indictment with successive rapes upon the prosecutrix, and with aiding each other in turn.⁴ A similar course has been followed where an indictment contained five counts for setting fire to five houses belonging to different owners, and it appears that the houses were in a row, and that one fire burnt them all;⁵ so, also, it was where an indictment, in the same count, charged four prisoners with assaulting and robbing two persons, who were walking together at the time when they were attacked;⁶ and also in a case where the defendant was charged in a single count with uttering several forged receipts (even as many as twenty-two) purporting to be signed by different persons, with intent to defraud,

also, *R. v. Finacane*, 1833; *R. v. Collier*, 1831. But see *R. v. Barry*, 1865 (*Martin, B.*).

¹ *R. v. Ward*, 1864 (*Byles, J.*). That was an indictment with three counts for sending three threatening letters. Held, that prosecutor must elect to proceed on one count.

² *Young v. R.*, 1789 (*Buller, J.*); *R. v. Levy*, 1819; *R. v. Birdseye*, 1830. See, also, *Anon.*, 1841 (*Ir.*).

³ *R. v. Dunn*, 1826; *R. v. Hinley*, 1843 (*Maule, J.*).

⁴ *R. v. Folkes*, 1832; *R. v. Gray*, 1835; *R. v. Parry*, 1837.

⁵ *R. v. Trueman*, 1839.

⁶ *R. v. Giddins*, 1842 (*Tindal, C.J.*).

it being alleged that all were uttered at one and the same time, and the proof corresponding with this allegation.¹

§ 331. It is expressly provided by statute that in the case of embezzlement by clerks, servants, and persons employed in the public service, or in the police, distinct acts, not exceeding three, may be charged in one indictment, if committed against the same master, and within six calendar months from the first to the last of such acts.² Still, if a prosecutor (not taking advantage of the statute) indicts his servant for a single act of embezzlement, he must confine his evidence to that alone, and, if it appear that the prisoner received different sums on different days, and made a false account respecting each sum separately, he must elect one sum and one day on which to proceed.³

§ 332. In the case of larceny, again, it is by statute provided that several counts may be inserted in the same indictment for distinct acts of stealing, not exceeding three, which may have been committed by the prisoner against the same person within the space of six calendar months.⁴ If, moreover, upon the trial of any indictment for larceny, the property alleged to have been stolen at one time shall turn out to have been taken at different times, the prosecutor shall not be put to his election, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings.⁵ In either of these last events the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as have occurred within six months of each other.⁵

§ 333. In the case, too, of receivers of stolen goods, it is also by statute provided⁶ that if the inquiry relate to a single criminal act, one or more counts for feloniously stealing property may be joined in the same indictment with one or more counts charging the felonious receipt of the same property by the prisoner, he well knowing it to have been stolen.⁷

¹ *R. v. Thomas*, 1800.

² 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 71. See *R. v. Balls*, 1871.

³ *R. v. Williams*, 1834.

⁴ 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 5.

⁵ *Id.* § 6.

⁶ *Id.* § 92.

⁷ *R. v. Beeton*, 1849. See *R. v. Hughes*, 1860.

§ 334. The *time* for putting the prosecutor to his election is, when it shall appear by the *evidence* that the two or more supposed occurrences took place at different periods. It is not sufficient for this purpose that the counsel for the Crown, in his opening address, states that the fact is so, because the witnesses, on being examined, may put the matter in a different light.¹

§ 335. It is now time to return to the consideration of the exceptions to the general rule that evidence of collateral facts is not usually receivable. The first exception to this general rule, which we were considering when we entered upon a digression as to the law of election is, it will be remembered, the exception embodied in the rule that evidence of collateral facts is received when such facts are connected with the transaction which is the subject of inquiry. A second *exception* to the general rule, which lays down that evidence of collateral facts cannot be received, arises where the question is a *matter of science*, and where the facts proved, though not directly in issue, tend to *illustrate the opinions* of scientific witnesses. For example, where the point in dispute was, whether a sea-wall had caused the choking up of a harbour, and engineers were called to give their opinions as to the effect of the wall, proof that other harbours on the same coast, where there were no embankments, had begun to be choked about the same time as the harbour in question, was admitted, as such evidence served to elucidate the reasoning of the skilled witnesses.² If the point in dispute be whether a defendant was or was not in his right mind on a certain occasion, it is clear that, after proof by a medical man, or (in a civil case) an admission by counsel, that madness is often of an hereditary character, evidence tending to show that none of the defendant's ancestors or near relations had been insane, would be admissible in support of the negative proposition; and on a question of disputed paternity, once prove as a matter of science that children are apt to inherit the features or general appearance of their parents, and then, as a matter of course, evidence will be received of personal resemblance between the party in question and his alleged father.³

§ 336. Yet a third exception to the general rule which, in

¹ R. v. Smart, 1841 (Ir.) (Bushe, C.J.).

² Folkes v. Chadd, 1782; M'Fadden v. Murdock, 1867 (Ir.).

³ Bagot v. Bagot, 1878 (Ir.).

criminal cases, excludes evidence of collateral facts, is that in such cases evidence of such collateral facts is not excluded, when it can raise a fair inference respecting the matter in issue by either tending to show a prisoner's *identity* or to *corroborate* the testimony of a witness in some material particular. For example, on an information for a libel, where the printer swore that he had received the manuscript from the defendant, and had returned it to him, and notice to produce it had been given to the defendant, other libels written by him concerning the same subject were received to corroborate the statement of the printer;¹ where a prisoner was charged with robbing the prosecutor of a coat by threatening to accuse him of an unnatural crime, evidence of a similar, but ineffectual, attempt on the following evening, when the prisoner brought a duplicate pawn-ticket for the coat, which was found on him at the time of his apprehension, was held admissible, as confirmatory of the truth of the prosecutor's evidence respecting what occurred on the former day;² on a charge of highway robbery, the prosecutor was allowed to rebut an alibi, by proving that, shortly before the attack upon him, and near the same spot, the prisoner had robbed another person;³ and even had no such defence been set up, similar evidence would, it seems, have been admissible, as showing at least that the prisoner was in the neighbourhood at the time when the crime was committed.⁴

§ 337. The exception just stated also prevails in civil causes. For instance, where a party was sued on a bill of exchange, accepted in his name by another person, and evidence had been given that this person had a general authority from the defendant to accept bills in his name, an admission by the defendant of his liability on another bill so accepted was held receivable in evidence to confirm the witness who had spoken to the general authority.⁵

§ 338. It may, in connexion with the rule that evidence of collateral facts is usually inadmissible, be noted that, where the *knowledge*, *intent*, or *good faith*, of a party is material, evidence may be admitted to prove facts which happened before or after

¹ *R. v. Pearce*, 1791 (Ld. Kenyon).

² *R. v. Egerton*, 1819, cited by Holroyd, J., in *R. v. Ellis*, 1826.

³ *R. v. Briggs*, 1839 (Alderson, B.).

⁴ *R. v. Rooney*, 1836 (Littledale,

J.). See, also, *R. v. Fursey*, 1833 (Parke and Gaselee, JJ.).

⁵ *Llewellyn v. Winckworth*, 1845.

See *Hollingham v. Head*, 1858; *Morris v. Bethell*, 1869.

the principal transaction, even when they have no direct or apparent connexion with such transaction. At first sight the admission of such evidence may appear to constitute another exception to the general rule. But the *knowledge* or *good faith*, or *intent* of the party being a material fact, the evidence, though apparently collateral, and foreign to the main subject, really has a direct bearing on an issue in the case. Therefore, the admission of such evidence, instead of being an exception to the rule, falls strictly within it. An example of this principle is that where the question is, whether the acceptor of a bill of exchange either knew that the name of the payee was fictitious, or at any rate had given the drawer a general authority to draw bills on him payable to fictitious persons, evidence may be admitted to show that he had accepted other bills, drawn in like manner, before it was possible to have transmitted them from the place at which they bore date.¹ Again, in an action for an assault and consequent injury, evidence that she had ascribed her injury to a previous accident having been given for the defence, the plaintiff was allowed to show that in fact no such accident had ever occurred.² So, too, in any trial, evidence will be admissible to prove or disprove any attempt at subornation of witnesses.²

§ 339. Further, in an action for fraudulently representing that a trader was trustworthy, whereby the plaintiff was induced to trust him, the defendant was permitted to call fellow-townsmen of the trader to state that, at the time when the representation was made, the man was, according to their belief, in good credit;³ in an action for the price of fixing railings to certain houses belonging to defendant, the defence to which was that plaintiff had given credit to a builder by whom the houses were built under a contract, such builder was, to show the bona fides of the defence, allowed to state that the order was given by him on his own account, and not as agent for the defendant, and that the defendant had actually paid him for the building of the houses, including the charge for the railings;⁴ and where a person seeks to set aside a contract on the ground of his having been insane when it was made, it must be shown that the defendant was at the time *aware* of the insanity,⁵

¹ Gibson v. Hunter, 1794.

² Melhuish v. Collier, 1850.

³ Sheen v. Bumstead, 1863.

⁴ Gerish v. Chartier, 1845.

⁵ Imperial Loan Co. v. Stone, 1892 (C. A.).

and, upon this question, evidence of the plaintiff's conduct, at different times, both before and after the date of the contract, is admissible to show that the madness was of such a character as must have been apparent to anyone who had had opportunities of observation like those afforded to the defendant.¹

§ 340. On the same principle, in an action against a company to recover money paid to them in consequence of a *fraud* alleged to have been committed by their agent, with their knowledge and for their benefit, evidence of similar frauds perpetrated on other persons by the same agent, with the knowledge and for the benefit of the defendants, is admissible in proof of fraudulent complicity in the case before the court;² in actions for false representation, where the questions turn on *fraudulent intent*, other mis-statements besides those laid in the statement of claim will be admissible in evidence, for the purpose of showing that the defendant was actuated by dishonest motives;³ in the Divorce Division, in a suit for dissolution of marriage, evidence of acts of adultery, subsequent to the date of the latest act charged in the petition, will be admissible for the purpose of showing the character of previous acts of improper familiarity;⁴ in actions for malicious arrest, the jury are always at liberty to draw an inference of malice *ex antecedentibus et consequentibus*;⁵ and in actions for defamation, other words written or spoken by the defendant, either before,⁶ or after, those declared upon, or even after issue joined,⁷ are admissible as evidence of *actual malice* or of *deliberate publication*;⁸

¹ *Beavan v. M'Donnell*, 1854.

² *Blake v. Albion Life Ass. Co.*, 1878. See ante, § 328.

³ *Huntingford v. Massey*, 1859 (Crompton, J.).

⁴ *Boddy v. Boddy*, 1860.

⁵ *Spencer v. Thompson*, 1855 (Ir.).

⁶ *Long v. Barrett* (Ir.), 1845; *Barrett v. Long*, 1856 H. L. Libels written as much as six years before that sued upon are admissible. The jury should, however, be cautioned not to give damages respecting them: *Ibid.* But the omission to give such caution will not amount to misdirection: *Darby v. Ouseley*, 1856. Such other libels are also admissible upon a question as to the construction of

the alleged libel: *Bolton v. O'Brien*, 1885 (Ir.).

⁷ *Pearson v. Le Maitre*, 1843. A letter written subsequently to the commencement of the action, and fourteen months after the libel complained of, is admissible: *Ibid.* See, also, *Macleod v. Wakley*, 1828, where a paragraph published only two days before the trial was admitted by Ld. Tenterden; and *Plunkett v. Cobbett*, 1804, where proof that a copy of the paper containing the libel was sold after action brought was admitted by Ld. Ellenborough as evidence of deliberate publication.

⁸ *Pearson v. Le Maitre*, 1843; *Barwell v. Adkins*, 1840; *Perkins v.*

and this whether the language on which the action is founded be equivocal or clear,¹—whether the collateral words tendered in evidence be addressed to the same party, to whom the slander is alleged in the statement of claim to have been spoken, or to a stranger,²—or whether those words be themselves actionable or not.³

§ 341. Again, in an action for false imprisonment, in which the defendant pleaded, first, not guilty, and secondly, a plea (which was abandoned and apologised for at the trial) setting up a justification, and alleging that plaintiff had committed a felony, it was held that, in estimating the damages under the first issue, the jury might take into account the fact of a justification having been pleaded, because the placing such a plea on the record was a persisting in the charge, which, under the circumstances, was strong evidence of malice.⁴ And if, on the trial of an action for slander, to which the general issue and a justification are pleaded, the plaintiff express his willingness to accept an apology and nominal damages on the plea of justification being withdrawn, but the defendant refuses to abandon such plea, though he offers no evidence in support of its truth, the jury may consider the defendant's conduct, not only with reference to the question of damages, but as furnishing evidence of express malice, and thus

Vaughan, 1842; Hemmings *v.* Gasson, 1858; Rustell *v.* Macquister, 1809 (Ld. Ellenborough); Charlter *v.* Barret, 1790 (Ld. Kenyon); Lee *v.* Huson, 1791 (id.); Scott *v.* Ld. Oxford, 1808 (Lawrence, J.); Delegal *v.* Highley, 1837 (Tindal, C.J.); Jackson *v.* Adams, 1835.

¹ See n. ³, below.

² Pearson *v.* Lemaitre, 1843; Mead *v.* Daubigny, 1792 (Ld. Kenyon).

³ Pearson *v.* Lemaitre, 1843, questioning Pearce *v.* Ornsby, 1835, and Symmons *v.* Blake, 1835. Tindal, C.J., in pronouncing the judgment of the court, states the correct rule to be, "that either party may with a view to damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that, if the evidence given for that purpose establishes another cause of action, the jury shall be cautioned

against giving any damages in respect of it; and if such evidence is offered merely for the purpose of obtaining damages for such subsequent injury, it will be properly rejected. And perhaps the cases of Pearce *v.* Ornsby and Symmons *v.* Blake went no farther than this. * * Upon principle, we think that the *spirit and intention* of the party publishing a libel are fit to be considered by a jury, in estimating the injury done to the plaintiff, and that evidence tending to prove them cannot be excluded, simply because it may disclose another and different cause of action." See, also, Rustell *v.* Macquister, 1809, where Ld. Ellenborough remarked, that the distinction between words actionable and not actionable was not founded on any principle; and Camfield *v.* Bird, 1852 (Jervis, C.J.).

⁴ Warwick *v.* Foulkes, 1844.

rendering the words proved actionable, though they were *primâ facie* privileged communications.¹

§ 342. If, however, in an action for a libel, the defendant set up the defences of a privileged communication and justification, which are openly abandoned at the trial, the jury ought not to take into consideration the circumstance that the justification was once pleaded.² And where it clearly appears that other libels are offered in evidence, merely with the view of unfairly recovering damages for the injury sustained by *their* publication, they will properly be rejected;³—indeed, no libels subsequent to that which is the subject of the action ought to be admitted, unless they directly refer to the defamatory language set out in the statement of claim, or at least relate to the same subject-matter.⁴

§ 343. Not only is other defamatory matter sometimes admissible for the purpose of showing the animus of the defendant, but the *mode* in which such matter was published may also be highly material; as, for instance, if printed placards were sent to the plaintiff's house, or paraded before his door.⁵

§ 344. On the other hand, on the principle that evidence of collateral facts is admissible to show *intent, malice, or good or bad faith*, a defendant has been allowed, in mitigation of damages, to give evidence palliating, though not justifying, his act of publishing a libel. For instance, he may show that he copied it from another newspaper,⁶ or that he had been *provoked* to act as he had done by the conduct of the plaintiff, who had previously published libels of him respecting the same subject-matter, which had only recently come to the knowledge of the defendant;⁷ for

¹ *Simpson v. Robinson*, 1848. A jury should, however, always consider *quo animo* a justification which fails was pleaded, and whether it was put forward *bonâ fide* as a defence, or only to embrace the opportunity of reiterating the charge. The mere failure to prove a justification is not alone and in itself evidence of malice: *Upton v. Hume* (Am.), 1893.

² *Wilson v. Robinson*, 1845.

³ See cases cited, ante, in notes ⁶, ⁷, and ⁸ to § 340; *Stuart v. Lovell*, 1817; *Defries v. Davis*, 1835.

⁴ *Finnerty v. Tipper*, 1809 (Sir J. Mansfield).

⁵ *Bond v. Douglas*, 1836 (Ld. Abinger).

⁶ *Upton v. Hume* (Am.), 1893; *Saunders v. Mills*, 1829, cited by Tindal, C.J.,

in *Pearson v. Le Maitre*, 1843. In *Talbutt v. Clark*, 1840, Ld. Denman would not permit the editor of a newspaper to show, in mitigation of damages, that the libel was published on the communication of a correspondent; and referring to a case, which was probably *Saunders v. Mills*, his Lordship observed, that "that decision had been very much questioned." However, by the recognition of *Saunders v. Mills* in *Pearson v. Le Maitre*, *Talbutt v. Clark* would seem to be indirectly overruled. See, also, *East v. Chapman*, 1827; *Charlton v. Watson*, 1834 (*Patteson, J.*); *Creedy v. Carr*, 1835.

⁷ *Watts v. Fraser*, 1837; *Tarpley v. Blabey*, 1836; *May v. Brown*, 1824;

evidence of provocation by libels on the defendant is admissible, not on the ground of any right to set off one libel against another,¹ but from an indulgent consideration of the weakness, which sometimes leads an angry man to say "that he should be sorry for." But it is now directed that in actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence.²

§ 345. Evidence as to *animus* or intent is, moreover, frequently admissible in criminal proceedings. For instance, on an indictment for knowingly uttering a forged document, or a counterfeit bank note, or counterfeit coin, proof of the possession, or (by statute) of the prior or subsequent³ utterance, either to the prosecutor himself or to other persons, of other false documents or notes, or bad money, though the latter be of a different description,⁴ or themselves the subjects of separate indictments,⁵ is admissible as material to the question of *guilty knowledge* or *intent*.⁶ In these cases, however, it is essential to prove distinctly that the instru-

Wakley v. Johnson, 1826; Finnerty v. Tipper, 1809. See Richards v. Richards, 1844. In America the defendant is allowed to give evidence, not only in mitigation of damages in a civil suit, but of punishment in criminal proceedings, that the plaintiff has libelled him previously to the publication by the defendant of the libel complained of. See Decamp v. Archibald (Am.), 1893.

¹ Watts v. Fraser, 1835 (Ld. Denman). In Judge v. Berkeley, 1825, Burrough, J., allowed the defendant, in an action of assault, to prove, in mitigation of damages, a series of libellous articles published respecting him by the plaintiff, one of which appeared on the day of the assault.

² R. S. C. 1883, Ord. XXXVI. r. 37.

³ R. v. Forster, 1855. This case disposes of a doubt raised in R. v. Taverner, 1809, and in R. v. Smith, 1831, as to whether evidence of *subsequent utterings*

would be admissible, if the notes or coin were of a *different* description.

⁴ R. v. Harris, 1836 (by all the judges); R. v. Forster, 1855. Doubts had been entertained on this subject by some of the judges in R. v. Millard, 1813, but the evidence was admitted in Sunderland's, Hodgson's, Kirkwood's, and Martin's cases (1830). The same evidence is admissible in Scotland: Alison, Cr. L. 420.

⁵ R. v. Hough, 1806; R. v. Weeks, 1861; Kirkwood's case, 1830 (Littledale, J.); Martin's case, 1814 (id.); R. v. Aston, 1838 (Alderson, B.); R. v. Lewis, 1840 (Ld. Denman). Contrà, R. v. Smith, 1827 (Vaughan, B.).

⁶ R. v. Wylie, 1804; R. v. Ball, 1807; R. v. Harrison, 1834 (Taunton, J., and Alderson, B.); R. v. Green, 1852 (Cresswell, J.); R. v. Nisbett, 1853 (Williams, J.); R. v. Salt, 1862 (Williams, J.); R. v. Colclough, 1882 (Ir.).

ments offered in evidence of guilty knowledge were themselves forged.¹ Moreover, though the prosecutor may prove the uttering of other forged notes by the prisoner, and his conduct at the time of uttering them, it seems that he cannot show what the prisoner said or did at another time, with respect to such uttering; for these collateral facts are too remote for any reasonable presumption of guilt to be founded upon them, and such as the prisoner cannot by any possibility be prepared to contradict.²

§ 346. Evidence of this description has long been admissible on charges of uttering, and of one or two offences of a cognate character.³ It has now been expressly rendered by the Legislature also admissible against receivers of stolen goods; the Prevention of Crimes Act, 1871, enacting⁴ that, “where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found⁵ in the possession of such person other property stolen within the preceding period of twelve months,⁶ and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him.”

§ 347. Nevertheless, in ordinary criminal trials, judges may, if they so please, still decline to recognise the doctrine under discussion.⁷ Yet not only has such doctrine been acted upon in the cases previously mentioned, but on a charge of sending a threatening

¹ *R. v. Millard*, 1813.

² *R. v. Phillips*, 1829 (Bayley, J.); *R. v. Cooke*, 1838 (Patteson, J.). Contrà, *R. v. Forbes*, 1835 (Colebridge, J.). See *R. v. Brown*, 1861.

³ *E.g.*, the obtaining money by falsely pretending to a pawnbroker that a spurious chain was silver: *R. v. Roebuck*, 1855; *R. v. Francis*, 1874. The doctrine, however, does not extend to ordinary indictments for false pretences: *R. v. Holt*, 1860. Still, it has been applied to cases of arson with intent to defraud insurance companies: *R. v. Gray*, 1866 (Willes, J., and Martin, B.), *sed qu.*

⁴ 34 & 35 V. c. 112, § 19.

⁵ It is not sufficient under these words to prove that the prisoner had very recently *dealt with* other stolen property: *R. v. Drage*, 1875 (Bramwell, L. J.); *R. v. Carter*, 1884 (C. C. R.).

⁶ This evidence will be admissible, though the property so found may be the subject of another indictment against the prisoner at the same assizes: *R. v. Jones*, 1877.

⁷ See and compare *R. v. Fairie*, 1857; *R. v. Winslow*, 1860; *R. v. Geering*, 1849, cited ante, § 328, followed *R. v. Flannagan*, 1882; *R. v. Oddy*, 1851; *R. v. Sirrell*, 1850; *R. v. Dunn*, 1826; *R. v. Nicholls*, 1838.

letter, other letters written by the prisoner, both before and after the one in question, have been admitted to explain its meaning;¹ on an indictment for malicious shooting, if it be doubtful whether the shot was fired by accident or design, proof may be given that the prisoner at another time intentionally shot at the same person;² and on indictments for murder, evidence of former menaces or quarrels will have an important tendency towards supporting the legal inference of malice,³ while proof of expressions of kindness or of friendly acts towards the deceased will be entitled to equal weight as raising a counter presumption.⁴

§ 348. On an indictment for a robbery, where the prisoners formed part of a mob who went into the prosecutor's house, one of which mob had civilly advised prosecutor to give it something to prevent mischief, evidence that the same mob, in the presence of some of the prisoners, had demanded money at other houses on the same day, was admitted, as tending to prove that the advice was not given *bonâ fide*, but was in reality a polite mode of committing a robbery.⁵ On this last case the acts given in evidence were not committed by the prisoners themselves, but only by some of the mob with whom they were connected. But the principle is the same, the law being, that where several evil-doers conspire together to effect some unlawful purpose, acts done by any one of the party in furtherance of the common design shall be considered as done by all.⁶

§ 349. On this rule, that collateral facts are admissible to show *animus* or *intent*, rests the admissibility of evidence as to the *general character* of individuals. Such evidence is tendered for the purpose of either raising a *presumption* of innocence or guilt, or of affecting the *amount of damages*, or of impeaching or supporting the *veracity* of a witness;⁷ the first object being chiefly confined to criminal

¹ *R. v. Robinson*, 1796.

² *R. v. Voke*, 1823. For other examples, see *R. v. Mogg*, 1830; *R. v. Dossett*, 1846 (Maule, J.); *R. v. Richardson*, 1860; *R. v. Harris*, 1864. See, also, ante, §§ 327, 328.

³ See *R. v. Hagan*, 1873.

⁴ 1 Ph. Ev. 470, 476.

⁵ *R. v. Winkworth*, 1830 (Parke, J.,

with the concurrence of Id. Ten-terden, Alderson, J., and Vaughan. B.). This doctrine forms an incident in Mr. Baring Gould's Novel "Cheap Jack Zita."

⁶ *R. v. Watson*, 1817; *R. v. Hardy*, 1794; *R. v. Salter*, 1804; *R. v. Hunt*, 1820.

⁷ 2 St. Ev. 303.

prosecutions, and the second to civil causes, while the third is equally applicable to both forms of procedure.

§ 350. The term "character," as here used, is not—as some able judges have considered it to be¹—synonymous with "disposition," but it simply means "reputation," or the general credit which a man has obtained in public opinion.² The position of a witness who is called to speak to character is exactly the opposite of that of a master who is asked for the character of his servant. The master must give his servant the character which his own personal experience has told him that the servant deserves. But a witness to character cannot give the result of his own personal experience and observation, or express his own opinion, but must, in strict law, confine himself to evidence of mere general repute.³ This rule rests rather on authority than on reason, and would probably have been long ago discarded but for two causes. First, the rule, in practice, is seldom strictly enforced; and next, as "the best character is generally that which is the least talked about,"⁴ the judges *have modified* it, to a certain extent, by permitting witnesses to give negative evidence on the subject, and state that "they never heard anything *against* the character of the person on whose behalf they have been called."⁵

§ 351. When the point at issue is whether the accused has committed a particular criminal act, evidence of his general good character is obviously entitled to little weight, unless some reasonable doubt exists as to his guilt; and, therefore, in this latter event alone will the jury be advised to act upon such evidence.⁶ The inquiry, too, must be confined,—except where the *intention* forms a material ingredient in the offence,⁷—to the *general* character of the prisoner, and must not condescend to *particular* facts.⁸ For

¹ *R. v. Rowton*, 1865 (Erle, C.J., and Willes, J.).

² *Id.*

³ *Id.* See post, § 1470.

⁴ Per Erle, C.J., 1865. Some judges, indeed, have asserted that evidence in this negative form is the most cogent proof of a man's good reputation: *Id.*

⁵ Per Cockburn, C.J., 1865.

⁶ In *R. v. Turner*, 1664, Hyde, C.J., observed to the jury:—"The

witnesses called in point of reputation I must leave to you. Few men that come to be questioned but shall have some come and say, 'he is a very honest man; I never knew any hurt by him;' but is this *anything against the evidence of the fact?*"

⁷ Ante, § 345.

⁸ *J'Anson v. Stuart*, 1796 (Buller, J.). In former times the practice was less strict. See *R. v. Turner* 1664.

although the common reputation, in which a person is held in society, may be undeserved, and the evidence in support of it must, from its very nature, be indefinite, yet some inference, varying in degree according to circumstances, may fairly be drawn from it; since it is not probable that a man, who has uniformly sustained a character for honesty or humanity, will forfeit that character by the commission of a dishonest or a cruel act. The mere proof of isolated facts can, however, afford no such presumption. "None are all evil," and the most consummate villain may be able to prove that on *some* occasions he has acted with humanity, fairness, or honour. In all cases, too, when evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him; ¹ as, for instance, if he be accused of theft, that he has been reputed an honest man;—if of treason, a man of loyalty. It should also relate to the same period as the supposed offence; for, as Lord Holt once remarked, "A man is not born a knave; there must be time to make him so; nor is he presently discovered after he becomes one."² Subject to these observations, evidence of the defendant's general good character is admissible in all prosecutions whether for felony or misdemeanor.³

§ 352. Although a defendant is, from motives of humanity, allowed this reasonable indulgence, the prosecutor cannot, in the first instance, have recourse to similar loose testimony for the purpose of establishing the guilt of the accused.⁴ If, however, with the view of raising a presumption of innocence, witnesses to character are called for the defence, counsel for the Crown may then not only cross-examine such witnesses to rebut this presumption, either as to particular facts,⁵ or, if it be deemed essential, as to the grounds of their belief,⁶ but evidence of general bad character will also

¹ *Douglass v. Tousey*, 1829 (Am.).

² *R. v. Swendsen*, 1702.

³ 2 Russ. C. & M. 784.

⁴ *R. v. Tuberfield*, 1864. In that case the question was put, not to prove the guilt of the prisoner, but to show that the witness, a policeman, had had probable cause for arresting him. Held, nevertheless, that the answer was not evidence.

⁵ *R. v. Hodgkiss*, 1836. In *R. v. Wood*, 1860, Parke, B., allowed a witness to character to be asked, in cross-examination, whether he had not heard that the prisoner was *suspected* of having committed a robbery some years before. See, also, *R. v. Turner*, 1664.

⁶ 2 St. Ev. 304.

be admissible,¹—though the right of counsel for the Crown in this respect is in practice seldom resorted to.² Moreover, in most trials for felony, and in some for misdemeanor, if defendant endeavour to establish a good character, either by calling witnesses himself, or by cross-examining the witnesses for the prosecution,³ the prosecution have a right—which is usually exercised—to, in answer, prove the specific fact that the prisoner has actually been convicted previously. The statutes authorizing this, however, do not extend to any *capital* felonies, and apply only partially to misdemeanors.⁴

§ 353. Moreover, the Prevention of Crimes Act, 1871,⁵ in addition to the provisions which have been already⁶ set out, provides⁷ that “where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen; provided that not less than seven days’ notice in writing shall have been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused.”⁸

§ 354. The admission of evidence of general character is only

¹ *R. v. Rowton*, 1865, by all the judges, overruling *R. v. Burt*, 1851.

² 2 St. Ev. 304.

³ *R. v. Shrimpton*, 1851; *R. v. Gadbury*, 1838 (Parke, B.).

⁴ See, as allowing this, 6 & 7 W. 4, c. 111, as to *any felony not punishable with death* after conviction for felony; as to offences punishable under that Act, 24 & 25 V. c. 96 (“*The Larceny Act, 1861*”), § 116; see also, as to offences against the coin, 24 & 25 V. c. 99 (“*The Coinage Offences Act, 1861*”), § 37; *R. v. Martin*, 1869; and as to any felony, or the offence

of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanor under 24 & 25 V. c. 96 (“*The Larceny Act, 1861*”), § 58. See, also, “*The Prevention of Crimes Act, 1871*” (34 & 35 V. c. 112), §§ 9, 20.

⁵ 34 & 35 V. c. 112.

⁶ Ante, § 345.

⁷ In § 19.

⁸ *R. v. Davis*, 1870.

allowed in criminal proceedings, where it was originally received, some two centuries ago,¹ in favorem vitæ. So strict is this rule, that even upon an information for penalties filed in the Revenue side of the Queen's Bench Division by the Attorney-General, such evidence will be rejected, because proceedings of this kind, though brought in the name of the Sovereign, are considered as civil suits.² Evidence of general good character or competency is not admissible either in an action of ejectment by an heir-at-law against a devisee, where defendant was charged with having imposed a fictitious will on the testator in extremis;³ in an action for slander—even where, by pleading the truth of words charging the plaintiff with stealing money, the latter had put the character of the former directly in jeopardy;⁴ in an action for malicious prosecution,⁵ in support of probable cause; in an action of trespass for false imprisonment on a criminal charge, in which the defendant must not even cross-examine, either as to the plaintiff's bad character, or as to previous charges made against him;⁶ nor in an action for a libel charging a professional man with want of skill in some particular work—and this even though the evidence be offered with a view of showing that the defendant, in making the charge, was actuated by malice.⁷

§ 355. A distinction, however, exists between cases where *particular* acts of misconduct are imputed to a party, and those where his *general* conduct is put in issue. For general evidence of cha-

¹ So early as 1664, the practice of calling "witnesses in point of reputation" was well established. See Hyde, C.J., in *R. v. Turner*, 1664. Accordingly, in 1680, such evidence was received even by Scroggs, C.J., with Jefferies as prosecuting counsel: *R. v. Harris*, 1680.

² *Att.-Gen. v. Bowman*, 1791 (Eyre, C.B.). His lordship observed, that "the true line of distinction is this; in a direct prosecution for a crime, such evidence is admissible; but where the prosecution is not directly for the crime but for the penalty, as in this information, it is not." See *Att.-Gen. v. Radloff*, 1854 (Martin, B.).

³ *Doe v. Hicks* (Buller, J.), cited by Gibbs, arguing, in *Doe v. Walker*,

1801.

⁴ *Cornwall v. Richardson*, 1825 (Abbott, C.J.).

⁵ *Newsam v. Carr*, 1817 (Wood, B.); *Gregory v. Thomas*, 1811; contra, *Rodriquez v. Tadmire*, 1799 (Lord Kenyon). In America, this kind of evidence has been also rejected in actions of assault and battery: *Givens v. Bradley*, 1813 (Am.); and in assumption, *Nash v. Gilkeson*, 1819; and is inadmissible whenever the general character is involved by the plea only, and not by the nature of the action: *Anderson v. Long*, 1823 (Am.); *Potter v. Webb*, 1829 (Am.). See Gr. Ev. § 55.

⁶ *Downing v. Butcher*, 1841; *Jones v. Stevens*, 1822.

⁷ *Brine v. Bazalgette*, 1849.

racter, though rejected in the former, is admitted in the latter class of cases.¹ Thus, in an action for a libel, where the language complained of stated that the defendant parted with the plaintiff "on account of her incompetency, and her not being ladylike or good tempered," general evidence of her competency, good temper, and manners was given by her personal friends;² and where, in a similar action, the words charged the plaintiff generally with dishonesty and misconduct while in service, a witness, with whom she had formerly lived, was allowed to testify to her antecedent general good conduct.³ These cases are, however, in truth no exception to the rule of exclusion.⁴

§ 356. General evidence of character is (subject to compliance with the rule as to previous notice in actions for libel or slander, which has been set out while considering the subject of evidence of libellous attacks upon a defendant being received in mitigation of damages⁵) admissible, not only upon questions of *malice*, intent, and so on, but also for the purpose of increasing or diminishing *damages*. For example, evidence impeaching the previous general character as to chastity of the seduced wife or daughter is admissible on a petition claiming damages on the ground of adultery,⁶ or in an action for seduction.⁷ For in these proceedings the plaintiff in reality (though in actions for seduction it is not the ostensible ground of claim⁸) seeks compensation for the pain caused him, by the disgrace of his family, and the ruin of his domestic happiness; and the damages should be commensurate with the pain, and vary according as the character of the seduced wife or daughter was

¹ *Doe v. Hicks*, undated (Buller, J.), as cited by Gibbs, *arguendo*, in *Doe v. Walker*, 1801.

² *Fountain v. Boodle*, 1842. See *Brine v. Bazalgette*, 1849.

³ *King v. Waring*, 1803 (Ld. Alvanley).

⁴ For just as in cumulative offences, such as treason, or a conspiracy to carry on the business of common cheats, many acts are given in evidence, because such crimes can be proved in no other way: *R. v. Roberts*, 1808 (Ld. Ellenborough), so where the general behaviour of a party is impeached, it is only by

general evidence that such charge can be rebutted.

⁵ See Ord. XXVI. r. 37, ante, § 344; see, also, § 349.

⁶ 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), § 33.

⁷ *B. N. P.* 27, 296; *Elsam v. Faucett*, 1797 (Ld. Kenyon).

⁸ See *Dodd v. Norris*, 1814 (Ld. Ellenborough); *Andrews v. Askey*, 1837, (Tindal, C.J.). See, also, cases cited in n. a., to S. C.; *Grinnell v. Wells*, 1844; *Thompson v. Koss*, 1858; *Long v. Keightley*, 1877 (Ir.); *Rist v. Faux*, 1863; *Terry v. Hutchinson*, 1868; *Hedges v. Tagg*, 1872.

previously unblemished or profligate. Therefore, in such cases, not only is evidence of general bad character admissible in mitigation of damages, but even particular acts of immorality or indecorum may be proved.¹

§ 357. Both evidence of acts of this description, as well as proof of general bad character, must, however, be confined to occurrences *previously* to the defendant's misconduct, because this very misconduct may, by weakening the principles of the woman, have been the indirect cause of subsequent immorality, and may have itself occasioned a general want of reputation.² In an action of seduction, where plaintiff's daughter is called as a witness, the defendant can probably in strict law (but if such a course were adopted in practice it would be made matter of strong observation) prove specific acts of immorality, without first cross-examining the woman; since, on principle, such evidence may be tendered, not so much to impeach the veracity of the party seduced, but to show that, as her previous conduct had been disgraceful, the father's feelings could not have been wounded by the misconduct of the defendant.³ However, where the daughter, in her examination in chief, states that the defendant seduced her, and that she has borne a child in consequence, and the defence is that she has declared another person to be the father, it is clear that witnesses cannot be called to prove her declarations, unless she be first cross-examined as to the fact of her having made them; because, though language of this kind, if lightly uttered, would tend to degrade her character, yet, if used in earnest, it would directly contradict the testimony she had given, and would be evidence not in mitigation of damages, but in bar of the action.⁴

§ 358. On a claim of damages from an alleged adulterer,⁵ the co-respondent may prove, in mitigation of damages, that the petitioner has been guilty of notorious infidelity; has turned his wife out of doors; has refused to maintain her; or has otherwise been guilty of dissolute conduct;⁶ for, in such cases, a man can scarcely complain of the loss of that society upon which he has

¹ Verry v. Watkins, 1836 (Alderson, B.). See, also, Simpson v. Grayson, 1892 (Am.).

² Elsam v. Faucett, 1797.

³ Carpenter v. Wall, 1840.

⁴ Id.; Andrews v. Askey, 1837

(Tindal, C.J.).

⁵ See 20 & 21 V. c. 85 ("The Matrimonial Causes Act, 1857"), § 33.

⁶ B. N. P. 27; Bromley v. Wallace, 1803.

himself placed so little value. In an action for seduction, it would on principle appear that evidence in mitigation of damages may be given (since plaintiff conduced to the result by allowing his daughter to consort with such a person) to show that the defendant is notoriously a man of profligate habits. In actions for breach of promise, the defendant is entitled to prove, in mitigation of damages, that the plaintiff is a person, either of bad character,¹ or of coarse and brutal manners,² though acts of misconduct committed *after* the promise, or even *before* that event *without the knowledge* of the defendant,³ can, where sufficiently glaring to constitute a bar to the action,⁴ only be proved under a special defence.⁵

§ 359. It has been much discussed, and is not now clear, whether, in an action for defamation, evidence impeaching the plaintiff's previous general character, and showing that, at the time of the publication, he laboured under a general suspicion of having been guilty of the charge imputed to him by the defendant, is admissible as affecting the question of damages.⁶

§ 360. Assuming, however, such evidence to be admissible, a defendant in libel or slander, who has not pleaded truth as a justification, is now precluded, by a Rule of Court already set out, from attempting to mitigate damages by giving evidence reflecting on the plaintiff's character, unless he has complied with such Rule.⁷

¹ Foulkes v. Sellway, 1800 (Ld. Kenyon). See, also, Johnson v. Caulkins, 1799 (Am.); Boynton v. Kellogg, 1807 (Am.).

² Leeds v. Cook, 1803 (Ld. Ellenborough).

³ Irving v. Greenwood, 1824 (Abbott, C.J.).

⁴ Leeds v. Cook, 1803; Baddeley v. Mortlock, 1816.

⁵ Ante, § 301. See Young v. Murphy, 1836; and Pujolas v. Holland, 1841 (Ir.).

⁶ See, in support of the admissibility of the evidence, Richards v. Richards, 1844; — v. Moor, 1813; Ld. Leicester v. Walter, 1809; Bell v. Parke, (Ir.) 1860 (Pigot, C.B.); Williams v. Callender, 1810; Eamer v. Merle, 1802-9 (Ld. Ellenborough); Knobel v. Fuller, 1797 (Eyre, C.J.); Newsam v. Carr, 1817 (Wood, B.); Ellershaw v. Robinson, 1816-28 (Holroyd, J.); Moore v. Oastler, 1836 (Ld. Denman, after consulting Parke,

B.); Mawby v. Barber, 1826 (Ld. Tenterden); Hardy v. Alexander, 1837 (Coltman, J.). These last four cases are cited in 2 St. Ev. 641, 642, n.e.; Acc. Kirkman v. Oxley, 1811-16 (Heath, J.). See contra, Scott v. Sampson, 1882 (Mathew and Cave, JJ.); Jones v. Stevens, 1822; Waithman v. Weaver, 1822 (Abbott, C.J.); Cornwall v. Richardson, 1825 (Abbott, C.J.); Snowden v. Smith, 1811 (Chambre, J.). In Scotland the evidence is admissible: Dickson, Ev. (Sc.) § 24, and cases there cited in n. (d). For the American authorities, see Root v. King, 1827 (Am.); Bailey v. Hyde, 1820 (Am.); Bennett v. Hyde, 1825 (Am.); Douglas v. Tousey, 1829 (Am.); Inman v. Foster, 1832 (Am.); Walcott v. Hall, 1810 (Am.); Ross v. Lapham, 1817 (Am.); Foot v. Tracy, 1806 (Am.).

⁷ R.S.C. 1883, Ord. XXXVI. r. 37, cited ante, § 344, ad fin.

§ 361. In the above cases, as well as in other actions for libel, and other actions where witnesses to character are admitted, the evidence impeaching the plaintiff's previous general character must (if admissible) be confined to the particular trait in it which is attacked in the alleged libel. Such evidence must, moreover, be confined to the *general reputation* as to plaintiff's character on this point, and it must not relate to particular *acts* of bad *conduct*.¹ Evidence of any rumours calculated to compromise the plaintiff's character must, too, be strictly confined to rumours which were prevalent *before* the publication of the slander of the defendant; otherwise a man might slander another, and then call neighbours to say that they had heard of the imputations which he had himself originated.²

§ 362. A plaintiff cannot give evidence of *general good character in aggravation of damages*, unless counter-proof has been first offered by the defendant; for, until the contrary appear, the presumption of law is already in his favour. Therefore, in an action of slander for imputing theft, plaintiff will not be allowed to prove his character for honesty, even though the defendant has placed on the record pleas of justification.³ Indeed, in an action for seduction, where evidence was produced for the defence, to prove that the girl had previously had a child by another man, she was not allowed to be asked respecting her general good character for chastity, but plaintiff was restricted to proof that the specific charge made by the defendant was false;⁴ on another occasion similar evidence was rejected where the daughter had been cross-examined, with a view of showing that she had been guilty of gross levity and indelicacy;⁵ and in a case for criminal conversation, in which the defendant had endeavoured, by cross-examining the plaintiff's witnesses, to impeach plaintiff's character, but had failed, plaintiff was not permitted to call witnesses to his general good conduct.⁶ It is true that in these cases the characters attacked remained, in strictness, unimpeached, because the facts insinuated had, or might have,

¹ See cases cited in last note but one, and further, *Andrews v. Vanduzer*, 1814 (Am.); *Sawyer v. Eifert*, 1820 (Am.).

² *Thompson v. Nye*, 1850; *Bell v. Parke*, 1860 (Ir.).

³ *Cornwall v. Richardson*, 1825

(Abbott, C.J.).

⁴ *Bamfield v. Massey*, 1808 (Ld. Ellenborough).

⁵ *Dodd v. Norris*, 1814 (Ld. Ellenborough).

⁶ *King v. Francis*, 1800 (Ld. Kenyon).

been denied. But, the very circumstance of the questions being asked was calculated to excite a suspicion in the minds of the jury, which, it may be said, the plaintiff should be given an opportunity of removing.¹ A contrary rule has prevailed in a later English case,² subsequently followed in Ireland.³

§ 363. The law as to the admission of general evidence of character to *impeach the veracity of a witness* will be discussed hereafter.⁴ Such evidence is, however, sometimes receivable, not so much to shake the credit of the witness, as to show directly that the act in question has not been committed. Thus, on indictments for rape, or attempts to commit that crime, not only is evidence of general bad character admissible to show that the prosecutrix ought not to be believed upon her oath, but so also is proof that she is a reputed prostitute, for it goes far towards raising an inference that she yielded willingly. In such cases general evidence of this kind will on this ground be received, though the woman be not called as a witness, and though, if called, she be not asked, on cross-examination, any questions tending to impeach her character for chastity.⁵ Counsel for the defence cannot, however, prove *specific* immoral acts with the prisoner, unless he has first given the prosecutrix an opportunity of denying or explaining them.⁶ Moreover, the prosecutrix, if cross-examined as to particular acts of immorality with other men, may decline to answer such questions, while, if she answers them in the negative, witnesses cannot be called to contradict her.⁷

¹ 1 C. & P. 100, n. a; 2 St. Ev. 306, 307.

² *Bate v. Hill*, 1823 (Park, J.); *Murgatroyd v. Murgatroyd*, 1828 (Bayley, J.). See, also, *R. v. Clarke*, 1817.

³ In *Brown v. Goodwin* (Ir.), 1841 (Torrens, J.), an action for seduction, in which plaintiff's daughter having been asked questions to impeach her reputation, plaintiff was allowed to call witnesses to her general good character.

⁴ Post, §§ 1470—1473.

⁵ *R. v. Clarke*, 1817 (Holroyd, J.); *R. v. Clure* (Ir.), 1841 (Crampton, J.).

⁶ *R. v. Cockcroft*, 1870. See *R. v. Martin*, 1834; *R. v. Robins*, 1843;

R. v. Aspinall, 1827 (Hullock, B.). On one occasion the prisoner's counsel was allowed to ask the prosecutrix, with the *view of contradicting her*, whether she had not, on a day since the alleged rape, been walking in a certain street with a common prostitute, looking out for men: *R. v. Barker*, 1829 (Park, J., after consulting Parke, J.); see, also, *Verry v. Watkins*, 1856; *Andrews v. Askey*, 1837; and *R. v. Dean*, 1852.

⁷ *R. v. Cockcroft*, 1870 (Willes, J., and Martin, B.); *R. v. Holmes and Furness*, 1871 (C. C. R.); overruling *R. v. Robins*, 1843; *R. v. Hodgson*, 1812; *secus*, as to acts with prisoner himself, post, § 1441.

AMERICAN NOTES.

Res inter alios actæ. — It may be doubted whether many of the facts excluded under the rule hinted at in the phrase *res inter alios actæ* are excluded because they are irrelevant. It is one of the few errors in Mr. Justice Stephen's admirable Digest of Evidence that all questions of admissibility are decided by him on the single test of relevancy. Such does not seem to be the case. Relevancy indeed is essential to admissibility. But it is not sufficient, in all instances, to secure it. It might almost be said to be the essential characteristic of the English common law of evidence that much evidence, perfectly relevant, is not received; — because practical dangers and difficulties in receiving it are thought or have been thought to outweigh the advantages which could be derived from its use. Probably the historical reason of much of this is to be found in a persistent influence of the feeling that a jury was liable to be confused, or misled by the consideration of certain matters that would not affect better disciplined minds to the same extent. That it was better, on the whole, to lose the benefit of the evidence, rather than run the risk. The fact that many kinds of evidence are admitted, either directly or as exceptions to the rules of exclusion, which seem quite as dangerous as those which are ruled out, counts for but little. The law of evidence is neither the growth of one mind or of several minds at one time. It was not even the work of a single age. Its symmetry therefore lays little claim to admiration. And all that can be said is that certain great rules for excluding otherwise competent evidence became established. That they are principally four; — *Res inter alios actæ*, matters of hearsay, character, and opinion. That certain exceptions in the operation of each of these general rules have also become established. It is perhaps not a scientific statement. But it is apparently correct as a general statement, and gives the present condition of a branch of law which, considering the conditions of its growth, is greatly to the credit of those men who have helped to mould it; — in that it has served its purpose, on the whole, fairly well.

The rule of *res inter alios* excludes evidence otherwise relevant. There is little need of a special rule excluding irrelevant evidence. It excludes itself, furnishing slight apparent necessity for classifying the reasons why it is irrelevant. As a rule of exclusion, the rule forbids the attempt to prove that A. did or omitted to do a certain act by means of evidence that he did or omitted to do the same or a substantially similar act at another time.

On the question whether the driver of a horse-car stopped his car with undue suddenness, it is erroneous to admit evidence of his sudden stopping on previous occasions. *Maguire v. Middlesex Rail-*

way, 115 Mass. 239 (1874). In a case involving responsibility for a maritime collision, it is error to permit the captain of one of the vessels to be asked as to "accidents which had happened while he was pilot or captain of the propeller." *Mailler v. Express Propeller Co.*, 61 N. Y. 312 (1874). The question whether a railroad company gave danger signals at a certain crossing "is a question of fact that cannot be affected one way or another by showing the conduct of subordinate officers or servants in charge of some other train or trains" in giving the signals at this crossing. *Eskridge v. Cincinnati, &c. R. R.*, 89 Ky. 367 (1889). So in a case in Massachusetts, the issue being whether the bell was rung and the whistle sounded at a certain crossing, the court say, "It was not competent for the defendant to prove that its servants usually rang the bell at this crossing, and to ask the jury to infer therefrom that it was rung at the time of the accident; neither was it competent for the plaintiff to prove that the defendant's servants often or usually omitted to ring the bell at this crossing, and to ask the jury to infer therefrom that the bell was not rung at the time of the accident." *Tuttle v. Fitchburg R. R.* 152 Mass. 42 (1890).

On an issue as to the terms of a contract for the service of a stallion, evidence is incompetent as to contracts with others for the same service. *Evans v. Koons*, 10 Ind. App. 603 (1894). Of course the rule does not apply where the second contract refers to the first. *Gardner v. Crenshaw*, 122 Mo. 79 (1894). See also *Roberts v. Dixon*, 50 Kans. 436 (1893).

On an issue of *devisavit vel non* the claim was made by the remonstrants that the will was forged by the propounder. Held: the propounder could not be asked whether he had not been guilty of other forgeries. "The fact of forgery of a particular paper cannot be shown by proof of other crimes of the same kind." *Franklin v. Franklin*, 90 Tenn. 44 (1890). Similarly, it has been held that where the payee is claimed to have forged one of the endorsements on the note, evidence of his previous conviction of forgery is immaterial. *Benedict v. Rose*, 24 S. C. 297 (1885). Or that the party had the "capacity, skill, and appliances which would enable him to forge the note in suit." The court say: — "In cases where a person is accused of a crime, it is not competent to show, as evidence of the *corpus delicti*, that he has committed similar offences, or that he is of bad character, or that he has the capacity and the means of committing the crime. The argument in favor of admitting such evidence is plausible. It might aid the jury if they could know the character of the defendant, — whether he is a man morally and physically able and likely to commit the offence; but the law excludes such evidence upon grounds of public policy, to prevent the multiplication of issues in a case, and to protect a party from the injustice of being called upon, without notice, to explain the

acts of his life not shown to be connected with the offence with which he is charged." *Costelo v. Crowell*, 139 Mass. 588 (1885).

Where the question was whether the plaintiff made a certain contract with the defendant, it is not competent for him to show that he made similar contracts with other people. "The maxim that a transaction between two persons ought not to operate to the disadvantage of a third, though somewhat obscure in its application, because it does not show how unconnected transactions should be supposed to be relevant to each other, and though failing in its literal sense, because it is not true that a man cannot be affected by a transaction to which he is not a party, is nevertheless one of the most important and practically useful maxims of the law of evidence. It means . . . that you are not to draw inferences from one transaction to another that is not specifically connected with it merely because the two resemble each other; that they must be linked together by the chain of cause and effect in some assignable way before you can draw your inference," *Aiken v. Kennison*, 58 Vt. 665 (1886). On the question what arrangements a firm of book publishers made with one of their canvassers, evidence is incompetent, of their contracts with other canvassers, in the absence of evidence that the particular canvasser knew of such other contracts or of some usage in the business. *Newhall v. Appleton*, 102 N. Y. 133 (1886).

"It would seem also that custom or the habitual conduct of the defendant is not admissible to show the existence or absence of negligence in a given case." *Gulf, &c. Ry. Co. v. Rowland*, 82 Tex. 166 (1891).

In New Hampshire, however, "a different rule prevails, and has become established in cases where the evidence is conflicting; and it is here held to be competent to show that the party charged with negligence had performed or omitted the same act in the same way before, as tending to show that he did or omitted the act at the time in question, on the ground that a person is more likely to do a thing in a particular way, as he is in the habit of doing or not doing it." *Parkinson v. Nashua, &c. R. R.*, 61 N. H. 416 (1881).

In Massachusetts, the rule prevails that on an issue of the value of land evidence is admissible of the price at which other lots, similarly situated, sold about the same time. *Roberts v. Boston*, 149 Mass. 346 (1889). The preliminary question as to whether the lots are so far similar and the time sufficiently near to render evidence of sales competent is for the court. "It is not competent to put in the opinion or judgment of witnesses as to the value of other land in the vicinity." *Thompson v. Boston*, 148 Mass. 387 (1889).

On a question whether a certain brick-kiln was a nuisance to the plaintiff, evidence is inadmissible that a certain other brick-kiln was not a nuisance to the witness. *Kirchgraber v. Lloyd*, 59 Mo. App. 59 (1894).

Of course the doing of acts at another time may be inadmissible on the ground of irrelevancy. For example, on an indictment for arson, it is fatal error to allow evidence that the defendant had stolen a buggy previously. *Schaser v. State*, 36 Wisc. 429 (1874). So on an issue of the value of a son's services in his father's store, evidence of what the father paid another son is immaterial. *Cohen v. Cohen*, 2 Mackey, 227 (1883). So in an action to recover against an estate for horse hire, evidence that the plaintiff did not charge certain other persons for the use of the same horse is immaterial. *Harris v. Howard*, 56 Vt. 695 (1884).

IN CRIMINAL CASES. — The rule excluding proof of similar acts at another time as evidence on the question of the doing of a particular act, has naturally been enforced with especial strictness in criminal cases. The increased probative force of proof of a prior illegal act and the seriousness in consequences to the prisoner have permitted but comparatively little relaxation in criminal as compared with civil cases. To permit this evidence, would substantially amount to proof of character by evidence of particular acts of misconduct. This cannot be done directly, and this rule forbids its being done indirectly. "The rule is a familiar one in criminal procedure, that a party cannot be proved guilty of one offence by evidence that at a different time and place he was guilty of committing a similar crime." *Com. v. Campbell*, 7 All. 541 (1863).

Thus on an indictment for advising a slave to escape, it is error to allow the government to show that the defendant previously advised another slave to escape. *Cole v. Com.*, 5 Gratt. 696 (1848). On an indictment for infanticide, an admission, by silence, that the prisoner "had a child this way before, and put it away," is inadmissible. *State v. Shuford*, 69 N. C. 486 (1873).

So on an indictment for murder it was held to be error to permit the government to connect the prisoner with other offences. "The only effect of testimony of this character was to distract the attention of the jury from the real issues in the case and to fill their minds with prejudice against the accused. All independent matters and all independent crimes which are disconnected from the crime then under investigation, which shed no light upon the alleged criminal transaction, are to be rigorously excluded for the reasons already given." *State v. Parker*, 96 Mo. 382 (1888).

"As a general rule, it is not admissible to adduce evidence that a defendant committed an offence, in order to prove that he committed another." *State v. Alston*, 94 N. C. 930 (1886).

On an indictment for murder, preceded by an attempt at robbery, it is error to permit evidence of prior robberies by the defendants. "Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community." *Boyd v. U. S.* 142 U. S. 450 (1892).

On an issue of burglary evidence is incompetent of a prior burglary of the house of the prosecutor and the prisoner's connection with it. *Lightfoot v. People*, 16 Mich. 507 (1868).

The government in a criminal case, however, is not prevented from proving the offence charged because such proof incidentally shows that the defendant has been guilty of another crime. *Com. v. Johnson*, 150 Mass. 54 (1889).

The rule has no application where the prior act was the cause of the act in question. Under these circumstances "the two embrace but one continuing transaction, and, occurring at the same time and place, together constitute but the *res gestæ* of a single principal fact." *Prior v. State*, 77 Ala. 56 (1884).

RELAXATION OF THE RULE. — In two important particulars the benefits to be derived from the use of this species of evidence have been considered to more than compensate for the danger of admitting it. The controlling consideration apparently has been that two important sets of facts can frequently be proved in no other way. These are, (1), mental states, and, (2), in seeking a responsible cause among several possible causes.

(1) MENTAL STATES. — To prove purpose, intent, motive, knowledge, or other mental state is a task of difficulty. To the mediæval mind, indeed, the task was insuperable. To ascertain the secret thoughts of the human heart seemed to our ancestors a task beyond mere mortal power. A direct appeal to the judgment of Heaven, by ordeal, wager of battle, &c., was needed to aid consciously feeble resources for the discovery of truth, when locked up in a human breast. But this is a mystery which modern jurisprudence by the use of reason undertakes to unravel. It demands, however, from the nature of the problem, a certain relaxation of the usual rules of evidence. Unless the person whose mental state is involved admits its existence, the fact of such mental state can be established only by proof of its natural manifestations, either in language or conduct. It follows therefore that in cases where a mental state is a fact in issue or relevant to the issue, the usual expressions of such state are competent. The exclamation of pain, hatred, or malice; the threat of revenge; the timid expression of fear by a mind unduly influenced to do what its sense of justice repudiates; — these, and many others are admissible in any case where such a mental state is in issue or relevant, not as hearsay evidence of the facts stated, but as original circumstantial evidence of the existence of the state of mind of which they are the usual expression.

In like manner, the existence of such a mental state may be proved by evidence of conduct which is the usual expression of such state. It naturally follows that such proof will frequently be found in the doing of an act at another time similar to the one as to which the issue is raised in the case on trial. That such proof would

come within the scope of the rule against admitting *res inter alios actæ*, does not affect the validity of the reasoning under which it is received.

INTENT. — Perhaps the most frequent mental state to be affirmatively shown, especially in criminal cases, is the existence of a specific intent.

In an indictment for assault with intent to commit murder, "previous attacks . . . during the same evening, which showed a continuous and persevering determination, by repeated assaults, accompanied by threats to kill (the prosecutor) or otherwise injure him" were admitted. *Ross v. State*, 62 Ala. 224 (1878).

So on an indictment for murder previous threats or attempts to kill are competent. "This evidence did not of itself establish the fact that the defendant intended to kill his wife at the time he fired the fatal shot; but it was to be weighed by the jury in connection with all the facts surrounding the homicide for the purpose of determining the motive and intent of the defendant at the time." *People v. Jones*, 99 N. Y. 667 (1885).

So in an indictment for rape a prior unsuccessful attempt to commit the same crime upon the prosecutrix is competent. *People v. O'Sullivan*, 104 N. Y. 481 (1887); *State v. Walters*, 45 Ia. 389 (1877).

So in a libel for divorce on the ground of adultery prior acts of adultery are admissible "for the purpose of proving an adulterous disposition in the persons implicated, which itself tends to prove the particular act charged, as a continuation of the same immoral proclivity." *Hicks v. State*, 86 Ala. 30 (1888). So on an indictment for adultery, subsequent acts of adultery are competent, but the effect of the evidence must be properly limited, and it is error not to do so. *Funderburg v. State*, 23 Tex. App. 392 (1887); *State v. Way*, 5 Neb. 283 (1877).

In an indictment for adultery, one of the government witnesses testified to seeing the alleged guilty parties undress for the purpose of occupying the same bed for the night and go to bed together. The defence introduced evidence of the witness's character for truth. It was held that prior acts of undue familiarity were admissible. "The circumstances thus proved were such as naturally excite in the mind a belief that a woman who would so conduct herself, would be more likely to commit the fact alleged against her, than if her deportment had been modest and discreet." *Com. v. Merriam*, 14 Pick. 518 (1833).

In an action for malicious and wilful mischief the court permit evidence of other similar offences against the prosecutor by the defendant. "Inasmuch as the case was one where the motive or intent with which the act was committed was the gist of the offence, it was permissible to go into and show other criminal transactions

of a similar character, as evidence of the intent or motive." *Street v. State*, 7 Tex. App. 5 (1879).

So in a case of larceny, "as a general rule, evidence that the defendant has committed offences other than those charged in the indictment, though of a similar nature, is *prima facie* inadmissible. The general rule has its limitations and exceptions. When it is material to show the intent with which the act charged was committed, to illustrate its criminality, or to identify the accused as the person who committed the act laid in the indictment, such evidence is admissible." *Curtis v. State*, 78 Ala. 12 (1884).

In an action of libel the publication of which is claimed to be malicious, subsequent publications by the defendant are admissible "for the purpose of showing the personal malice and ill-will of the defendant towards the plaintiff." *Grace v. McArthur*, 76 Wisc. 641 (1890). In an indictment for manslaughter, evidence of cruel and abusive treatment of the deceased is admissible on the question of malice. *Burnett v. State*, 14 Lea, 439 (1884); *Eldridge v. State*, 27 Fla. 162 (1891).

So where the replication of express malice was made to a defence of privileged communication in an action of slander, the plaintiff is entitled to give evidence of a previous statement to a similar effect, under circumstances not privileged. *Hamel v. Amyot*, 14 Quebec, 56 (1887).

Where an innkeeper, in an action by a guest to recover for loss of property by fire, relied on a statutory exemption that the fire was incendiary, evidence was offered that on the same evening an attempt was made to fire a neighbouring building by similar means. The evidence was rejected, and such rejection was ruled to be error. The court, *per* Andrews, J., while conceding that the evidence offered would be incompetent against the prisoner on an indictment for arson, continue:—"But in investigating in a civil suit a question depending solely upon circumstantial evidence, it would, I think, be holding too strict a rule to refuse evidence such as was offered in this case, which is connected with the principal fact by circumstances which naturally tend to establish it. There is no fixed and definite rule, by which it can be determined whether a collateral fact is so remote as to be inadmissible to support the principal fact sought to be established. The question must, to a considerable extent, be decided in each case, on its own circumstances." *Faucett v. Nichols*, 64 N. Y. 377 (1876). On an indictment for arson, a prior attempt four weeks before by the defendant to fire the same buildings, is competent. "Evidence of previous unsuccessful attempts to commit the same crime for which a respondent is on trial, is admissible." *State v. Ward*, 61 Vt. 153, 181 (1888).

Where the issue was whether the plaintiff was dealing with the cashier of the defendant bank as an individual or as an officer of the

defendant bank, evidence is competent of former transactions of a similar nature between the parties. *L'Herbette v. Pittsfield National Bank*, 162 Mass. 137 (1894).

Acts admitted for the purpose of showing intent may really amount to what would popularly be termed circumstantial evidence of guilt, though in truth all evidence of the existence of one thing by proof of the existence of another is, in a sense, circumstantial. Thus on an indictment for stealing a hog, evidence is admissible that the defendant after the taking altered the brand on the hog, though this would be a distinct offence, "to show the intent with which the act charged was done . . . inasmuch as the altering of the previous mark of an animal tends to show the intent of converting it to one's own use." *State v. Thomas*, 30 La. Ann. Pt. 1, 600 (1878).

On an indictment for using instruments on a certain woman to procure a miscarriage, evidence of treatment by electricity of the same woman on the same occasion and of similar acts on other occasions, is competent. "Whether it was of acts which formed part of the principal transaction, or of acts of the defendant at other times, it tended to prove attempts of the defendant to procure the identical result the intent to procure which constituted the gist of the offence charged, — that is, to prove the intent which was charged in the indictment." *Com. v. Corkin*, 136 Mass. 429 (1884).

Where the defendant, an insurance agent, was indicted for fraudulently transferring to a certain insurance company from another company, for the purpose of shielding the latter, after he knew that the vessel called the "Wade" and her cargo insured had been lost, a certain share of the risk, evidence is admissible that he did the same thing as to other risks about the same time. "It was necessary for the People to show the evil motive and fraudulent intent of the defendant in changing the insurance upon the cargo of the Wade, after knowledge of the loss, from the Continental to the Thames and Mersey; and for the purpose of showing the motive and intent, it was competent for the People to show that the defendant had done similar acts, although it might thus be shown that he was guilty of other crimes." *People v. Dimick*, 107 N. Y. 13, 32 (1887).

MALICE. — Acts of the person whose malice at a particular time is important, whether made before or after the time in question, may be shown if such acts tend to establish the existence of malice at the time alleged.

On an indictment of a husband for the murder of his wife evidence of threats and acts of violence for a period of eight years prior to the death is competent. "It tended to show a settled ill-will and malice on the part of the defendant towards his wife, and therefore bore directly on the question whether there was any motive for him to commit the crime." *Com. v. Holmes*, 157 Mass. 233 (1892).

So in an action for malicious prosecution, the court say: "Malice may also be inferred, of course, from the circumstances surrounding and attending upon the prosecution, the conduct and declarations of the prosecutor, his activity in and about the case, his efforts therein to secure some personal end. Indeed, the existence of malice being a fact which, in the nature of things, is incapable of positive, direct proof, it must of necessity be rested on inferences and deductions from facts which can be laid before the jury; and hence it is that a wide range is permitted in adducing attendant circumstances which tend to throw any light on the subject." *Lunsford v. Dietrich*, 93 Ala. 565 (1890).

KNOWLEDGE.—That a particular fact was known to a person is difficult of proof in the absence of an admission or other affirmative proof. When, as frequently happens in criminal cases, it becomes necessary to establish such a mental state, the usual, and apparently the necessary, method of doing so is by proving facts which tend to render such knowledge probable. Usually a single fact of this nature so easily admits of explanation in the way of accident or mistake as to furnish but a slight degree of probative force. But it will be seen that the number of such as facts is multiplied, hypotheses which satisfactorily explain them all grow rapidly fewer and more difficult of belief. The necessity of the case and the valuable results to be obtained from the process have warranted a frequent use of facts which would otherwise be objectionable as *res inter alios actæ*.

The question being whether A. fraudulently induced B. to loan him money on the security of false certificates of stock, evidence of the possession and use by A. of other altered and false certificates about the same time, whether before or afterwards, is "competent, to show that his possession of those, for the use of which he was indicted, was not casual and accidental. . . . They were admitted and allowed to be used only to show guilty knowledge." *Com. v. Coe*, 115 Mass. 481 (1874).

On indictments for receiving stolen goods knowing them to have been stolen, evidence of stealing from the same persons of similar goods and their purchase by the accused, is competent. "The rule is recognized as well established, that in cases like the present, where guilty knowledge is an ingredient of the offence charged, the same may be proved as other facts are proved, by circumstantial evidence, and that other acts of a like character, although involving substantive crimes, may be given in evidence to prove the *scienter*. The principal limitation of the rule is, that the criminal act which is sought to be given in evidence, must be necessarily connected with that which is the subject of the prosecution, either from some connection of time and place, or as furnishing a clue to the motive on the part of the accused." *Coleman v. People*, 58 N. Y. 555 (1874).

It is not essential to this rule that the goods should have been stolen, in the second instances, from the same party. "Upon the trial on an indictment for receiving certain stolen goods, knowing them to have been stolen, evidence that other goods, known to have been stolen, were previously received by the defendant from the same thief, is admissible for the purpose of showing guilty knowledge on the part of the accused that the goods, for receiving which he is charged, were stolen." *Schriedley v. State*, 23 Ohio St., 130 (1872); *Devoto v. Com.*, 3 Metc. (Ky.) 417 (1861).

On an indictment for forging and uttering certain receipted bills for hides, "on the question of the defendant's knowledge that the bills in issue were not genuine, his possession and use of other similar false bills, about the same time, whether before or afterwards, in a continuous series of transactions with the same persons under the same contract, was competent to show that his use of the former was not innocent." *Com. v. White*, 145 Mass. 392 (1888). It is immaterial that the transactions extend some months later than the latest forgery mentioned in the indictment. *Ibid.*

To prove defendant's knowledge of the falsity of the false pretence used in obtaining a certain amount of money by means of a cheque, evidence of prior frauds on other parties, shortly before, is admissible. *Tarbox v. State*, 38 Oh. St. 581 (1883). In an action against a stage line for damages sustained by the overturning of a stage-coach, as bearing on the bad nature of the roads and the defendant's knowledge of the necessity of providing a careful driver in consequence, the frequent occurrence of other similar accidents may be shown. But such evidence is not admissible "for the purpose of showing negligence on the part of the driver at the time." *Higley v. Gilmer*, 3 Mont. 90 (1878).

So in an action of negligently setting fires by sparks escaping from a locomotive engine, prior instances of similar fires are admissible as bearing on "whether, in view of their previous occurrence, the company was, at the time of the fire in question, in the exercise of reasonable care." *Smith v. Old Colony, &c. R. R.*, 10 R. I. 22 (1871). But no evidence of past fires is admissible for that purpose. *Ibid.* So on an issue of negligence, it is competent to show other occurrences showing knowledge of defects on the part of the defendant. Thus, in an action for personal injuries caused by the cars of a freight train running off the track, evidence is competent that freight trains under the same conductor had run off the track seven or eight times within the preceding month. *Mobile, &c. R. R. v. Ashcraft*, 48 Ala. 15 (1872).

So on an indictment for passing counterfeit money a witness testified "that the defendant's wife sold to him a twenty dollar counterfeit bill belonging to the defendant, in his absence; but that the defendant subsequently was advised of the transaction and sanc-

tioned it." This was not the bill for the passing of which the defendant was indicted. Held, "the evidence was admissible as tending to show knowledge on the part of the defendant that the bill passed by himself was counterfeit, as the transactions were about the same time." *Bersch v. State*, 13 Ind. 434 (1859).

On an indictment for uttering and passing counterfeit money, evidence that the prisoner "had been employed in the business of printing parts of genuine bank bills was pertinent for the purpose of showing his knowledge in respect to bills. It tended to show guilty knowledge that the bills he passed were counterfeit." *Com. v. Hall*, 4 All. 305 (1862).

So on an indictment for uttering a forged cheque, it is competent to show the uttering of other forged cheques upon other occasions. "Such proof is not received for the purpose of showing other crimes than that charged in the indictment, but for the purpose of showing the guilty knowledge and intent which are elements of the crime charged." *People v. Everhardt*, 104 N. Y. 591 (1887).

MOTIVE. — It is obvious that where the doing of an act, especially one of serious consequence, is to be established by circumstantial evidence, one of the most essential objects of judicial inquiry is as to the existence of motive. Crimes of magnitude and other acts of grave import are not usually done without a motive, of some kind, which, for the time at least, probably appeared adequate. To establish such a motive, resort frequently must be had, as in proving other mental feelings, to proof of acts which are its usual expression or otherwise point to it. "Indeed, it would be difficult to detect criminals and bring them to punishment, by any other means than by following the thread of impelling motives." *Com. v. Ferrigan*, 44 Pa. St. 386 (1863). Instances of the use of this kind of evidence are extremely frequent.

For example, in a case where a father was indicted for murder of a daughter, May, it was the theory of the government that the defendant desired to be rid of a wife and two children, Irene and May, in order to marry another woman. "There was evidence tending strongly to support this theory, and to show that the death of each one of the victims was but a part of a system in which the lives of all were involved, and in the working out of which to the accomplishment of defendant's ulterior purpose, the life of each was, in substantially the same manner, ruthlessly sacrificed. Under these circumstances, all evidence going in any way to connect the defendant with the murder of his wife, or of his daughter Irene, was relevant to the issues involved on his trial for the murder of May, and was properly admitted." *Hawes v. State*, 88 Ala. 37, 67 (1889).

Similarly, where the object of the government was to show that the murder was committed to enable the prisoner to marry the wife of the victim, evidence of adulterous intercourse between these parties

was admitted. "He is a poor judge of human motives and impulses, who cannot see in such a relation as proposed to be proved here, between the deceased's wife and the prisoner, that it might lead to the perpetration of the crime charged, or who would deny that it would probably shed light on the motive for the act. History is full of such examples." *Com. v. Ferrigan*, 44 Pa. St. 386 (1863). So evidence is competent, in a similar case, "that during four of the eleven nights intervening between the killing and the finding of the body of the deceased, the accused and Polly, the wife of the deceased, slept in the same bed, and together, at witness's house. Clearly this was a pregnant circumstance, taken with the other proofs tending to show a motive for the crime on the part of the accused." *Miller v. State*, 68 Miss. 221 (1890).

"Evidence of one crime may be given to shew a motive for committing another, as in the case of *Rex v. Clewes* (4 C. & P. 221), and where several felonies are all parts of the same transaction, evidence of all is admissible upon the trial of an indictment for any of them." *R. v. Chasson*, 16 New Bruns. 546, 582 (1876). So where the motive claimed for a murder was revenge for procuring prisoner's dismissal from employment, evidence is admissible that the prisoner had stated that he so believed and had threatened to "fix" deceased for it. "Upon an indictment for murder, evidence of former grudges and antecedent threats is received, because it tends to show malice in the defendant against the deceased. Such evidence is admissible because it supplies a motive for the act." *State v. Palmer*, 65 N. H. 218 (1889).

On an action against certain judges of election for refusing to allow the plaintiff to vote, it was the plaintiff's contention that the motive of the defendants, who were all members of one political party, was the partisan one of preventing members of the opposite political party (of which the plaintiff was a member) from voting. Held: that evidence was competent that the defendants on the same day had rejected others of their political opponents for the same trivial reasons. "Where the inquiry turns upon intention and motive, and in cases where fraud, corruption and the like constitute the gist of the action, acts and declarations of a similar character, at or about the same time, to or towards third parties, are admissible to show the *quo animo* of the particular transaction." *Friend v. Hamill*, 34 Md. 298, 306 (1870).

In an indictment for the murder of one Prince Arthur Freeman by poison, the motive of the defendant, as claimed by the government, was as follows. That Freeman, a married man with a wife and two children, had insured his life for \$2000 in favor of his wife, Annie Freeman. That the defendant, a sister of his wife, was burdened with and pressed for the payment of debts which she had no means of paying. That thereupon, the defendant formed the plan

and intention of procuring to herself this insurance money, for the payment of these pressing debts, by first killing her sister; then inducing Freeman to make his life insurance payable to herself and, finally, killing him. The wife died February 26th, 1885; on May 13th, 1885, the defendant was appointed by Freeman beneficiary under his insurance certificate; on June 27th, 1885, Freeman died; the defendant's bills were paid from the insurance money which was duly received on September 23rd, 1885. The court ruled that upon a trial of a defendant for the commission of a crime, evidence that at another time he committed a similar crime could not be received or considered as tending to show that he committed the crime for which he was on trial; that therefore evidence tending to show that the defendant killed her sister Annie Freeman was not to be considered as indicating that she would be likely to kill Prince Arthur Freeman, and that all the evidence in relation to the death of Annie Freeman was only to be considered so far as it bore upon the question whether the defendant, at the time of the alleged murder of Prince Arthur Freeman, was actuated by the motive which was imputed to her by the Commonwealth, to obtain for her own use the life insurance money payable on his death. Held: "the ruling at the trial was correct." *Com. v. Robinson*, 146 Mass. 571 (1888).

In a Pennsylvania case involving a series of murders by poison, where the apparent motive in each case was different, the court insist that the existence of a common motive is an absolute essential to admitting evidence of other crimes. In other words, the crimes must be means to a common end foreseen from the beginning, as in the *Robinson* case, to admit the evidence of other crimes. "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other." *Shaffner v. Com.* 72 Pa. St. 60 (1872).

Where the supposed motive for the murder of a wife to whom the prisoner had been secretly married was the fact that the announcement of such marriage, which could be delayed but a short time longer, would interrupt his relations with a prostitute and prevent marriage with another woman living in Indiana, to whom he was then under engagement of marriage, letters of the prisoner to the deceased and such other women were held competent. "All of them . . . showed the existence of a relation between the accused and these two women which might be broken off or interfered with by his marriage to the deceased becoming public. They exhibited a motive why he should desire to rid himself of his wife and their unborn offspring." *O'Brien v. Com.*, 89 Ky. 354 (1889).

Where the claim was that the insured had swindled an insurance company by insuring his life for large amounts in favour of his creditors and other friends, then killing himself, a witness was allowed to testify that a few months before the process of insurance began he went at request of insured to raise money for him from his (insured's) friends; that he failed to accomplish the purpose and so informed the insured. "It indicated an existing motive for the fraud in the want of money and the failure to obtain it." *Smith v. N. B. Society*, 123 N. Y. 85 (1890). So where a prisoner had murdered his father and step-mother, the government was permitted on an indictment for the murder of the father to show ill-will on the part of the prisoner against the step-mother. "The motive which induced the defendant to kill any one of the family might very well be held to have induced him to kill the others." *Woolfolk v. State*, 85 Ga. 69, 105 (1890). So in a murder case, the court rule that, "It is permissible to prove previous altercations or combats between the accused and the deceased as tending to show malice, ill-will, or a motive for the killing. The object of such evidence is the fact of the previous difficulty, and collateral inquiries into the particulars, details of merits, are not allowable." *Garrett v. State*, 76 Ala. 18 (1884).

On an indictment for murder in an attempt to rape, evidence of the defendant's conduct about the time of the homicide toward various women in the neighbourhood showing an apparent desire to commit the crime of rape is admissible. But the government cannot show that the defendant committed a rape several years before on a woman other than the deceased. "The law in regard to proof of intent, is, I apprehend, in no particular different from the law in regard to the proof of other facts, unless it may be in the general principle that a person is ordinarily presumed to intend the natural consequences of his actions. But always the evidence will be subject to the condition that it legally and logically tends to prove the facts in issue, whether it be the intent or any other fact." *State v. Lapage*, 57 N. H. 245, 290 (1876); *State v. Walters*, 45 Ia. 389 (1877).

In an indictment for rape, evidence of solicitations six months previous is competent. "The evidence was admissible as tending to show the existence of a motive or passion that would render the commission of the act charged more probable." *State v. Knapp*, 45 N. H. 148 (1863).

To show that a defendant had negotiated the note in suit at a large discount because of his impecunious condition, evidence is admissible that he negotiated other notes at large discounts at about the same time. *Turner v. Luning*, 105 Cal. 124 (1894).

Where the doing of a prior act possesses a probative force apart from its resemblance to the act in question, such fact is, in general,

admissible, in the absence of special danger to be apprehended from its use.

PURPOSE. — So where criminal acts form part of a common purpose or organised plan of operations. "There is a distinct and significant probative effect, resulting from the continuance of the same plan or scheme, and from the doing of other acts in pursuance thereof. It is somewhat of the nature of threats or declarations of intention, but more especially of preparations for the commission of the crime which is the subject of the indictment." *Com. v. Robinson*, 146 Mass. 571 (1888).

On an indictment for stealing a horse it may be shown that the defendant on the same night stole a wagon from another person. "The taking a wagon to use with the stolen horse, if they were used together, was evidence of a corroborating circumstance to the main charge, and could be used as evidence for that purpose, notwithstanding it was proof of another felony also, not charged in the indictment." *Phillips v. People*, 57 Barb. 353 (1869). On an issue of larceny of a horse evidence of the larceny of a saddle and blanket at the same time was competent. *State v. Folwell*, 14 Kans. 105 (1874). So a larceny of a whiffletree about the same time, useful in enabling the prisoner to escape. *Ibid.*

On the contrary, the supreme court of Arkansas granted a new trial in a case where, on an indictment for larceny of two horses, evidence was admitted that the defendants had shortly afterwards stolen bridles and saddles with which to equip the horses for the journey. "It was not competent for the State to prove these separate and distinct offences, by the admissions of appellant, or otherwise, on his trial upon the charge of stealing the horse and mare." *Endaily v. State*, 39 Ark. 278 (1882). In this latter case, however, the evidence of stealing the horse was plenary the defendants having confessed. The evidence of the further larcenies seems to have served no useful purpose.

It is necessary to establish a connecting link between the transaction sought to be shown and the transaction in question; — as that they are part of a single plan or scheme. In a well-considered Massachusetts case, of alleged false pretences in the sale of a horse, similar false pretences in sales to other persons shortly before were held inadmissible. "It is not in general competent to show a distinct crime committed by the defendant for the purpose of proving that he is guilty of the crime charged. . . . But as in all crimes, except a few statutory offences, a criminal intent is necessary to be proved, evidence which legitimately bears upon this may be put in, even if it be derived from circumstances which also show the commission of another offence. . . . The evidence here admitted as to the three other distinct fraudulent sales does not appear to come within any of the exceptions to the general rule that limits the trial

to the immediate act for which the defendant is indicted. . . . The transactions formed no part of a single scheme or plan, any more than the various robberies of a thief." *Per* Devens, J., in *Com. v. Jackson*, 132 Mass. 16 (1882).

Where, on the trial of one charged with the forgery of a promissory note, it appears that the crime in question is one of a system of like crimes committed by the defendant in pursuance of a conspiracy, other notes forged by him during the pendency of the conspiracy and purporting to be executed by different persons, are admissible in evidence against him. "The reason for the rule in this and similar cases is that when once system is proved, each particular part of the system may be explained by the other parts which go to make up the whole." *Card v. State*, 109 Ind. 415, 420 (1886).

In a case in New Hampshire which the court evidently feel is a close one, the evidence having been admitted on the wrong ground at the trial, the court "after some hesitancy" decide that on an indictment for placing obstructions on a railroad track, evidence was admissible that shortly before and shortly after the obstructions in question were struck the defendants placed other obstructions on the track, in the immediate vicinity. "These acts would show that the defendants were near the place where the offence was committed, about the time it was committed, and that they were consequently in a situation to place the obstructions on the track, and had the strength and ability to put them there." *State v. Wentworth*, 37 N. H. 196 (1858). A similar reasoning is adopted in a Massachusetts case. "Where unlawful acts of the same general character are continuous in their nature, and appear to be parts of a general scheme or plan, participation in them at an earlier stage is the usual evidence that one who was afterward present was a participator then." *Tyson v. Booth*, 100 Mass. 258 (1868).

FRAUD. — Nowhere is a wider latitude given into the range of *res inter alios actæ* than in cases of fraud.

To show fraudulent intent, evidence is admitted of other frauds of a similar nature, especially where such evidence tends to establish the existence of an organized scheme, of which separate frauds constitute part.

For example, where it was claimed that the plaintiff was patentee of an invention for baling cotton, and that the defendants, an English company, making a similar device, fraudulently pretended to be about to purchase this invention, not actually intending to do so, but with the real object of keeping the market for their own process during the pendency of protracted negotiations, evidence that the defendants, during the same period, entered into negotiations with other American inventors, patentees of competing inven-

tions, in the same way and with the same object, is competent. "It was an important inquiry in the case, what was the purpose or animus of the defendants in their negotiations with the plaintiff? . . . If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at about the same time, and in relation to a like subject, was actuated by the same spirit." *Butler v. Watkins*, 13 Wall. 456, 464 (1871). On an issue whether the defendants fraudulently sold the plaintiff's goods to a person of no financial standing, it may be shown that they sold the goods of others to such persons with similar false representations. "Actions of this description, . . . where fraud is of the essence of the charge, necessarily give rise to a wide range of investigation, for the reason that the intent of the defendant is, more or less, involved in the issue. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances, as the means of ascertaining the truth." *Castle v. Bullard*, 23 How. 172, 187 (1859). So on an issue of a fraudulent entry of goods at the custom-house, evidence of similar previous fraudulent entries has been received. "Wherever the intent or guilty knowledge of a party is a material ingredient in the issue of a case, these collateral facts, tending to establish such intent or knowledge, are proper evidence." *Bottomley v. U. S.* 1 Story, 135, 144 (1840). Where it was claimed that the defendant procured an extension of time upon a certain indebtedness by fraudulent representations as to his ability to pay, evidence is admissible that at the same time the defendant was making like false representations to others. "The plaintiff relied upon showing, that the defendant had been engaged in a scheme, to defraud those upon whose credulity he could impose; and the entire history of the defendant's dealings with him, in regard to this money loaned, would tend, in some degree, though perhaps remotely, to show that it was with a continued intent to defraud, that he made the representations" in question. *French v. White*, 5 Duer, 254 (1856). On the issue whether a certain conveyance to the plaintiff was in fraud of A.'s creditors, evidence is admissible of other conveyances from A. to the plaintiff and collusive suits between A. and the plaintiff about the same time which were also in fraud of A.'s creditors. "It is usually the only mode of proving such matters. Purpose and intention, especially when there is an obvious motive for disguise, is only to be reached by inference, and safe inference can almost never be made from a single transaction, especially when the form of the act is in itself indifferent and of hourly occurrence." *Pierce v. Hoffman*, 24 Vt. 525 (1852); *Baldwin v. Short*, 125 N. Y. 553 (1891). "It is not essential to the competency of such evidence

that it should relate to transactions contemporaneous with the one investigated. If they are so closely related in time that the intent that governed in the one may fairly and reasonably be inferred to be the intent that controlled the other, then the one sheds light upon the other and is therefore a relevant subject of investigation." *Bernheim v. Dibrell*, 66 Miss. 199 (1888). So evidence that the alleged fraudulent grantee assisted the grantors in devising means to prevent their creditors from availing themselves of their legal remedies, *e. g.*, by leaving the State and remaining away until after a certain session of the trial court, is competent. *Adams v. Kenney*, 59 N. H. 133 (1879).

It is not, *per contra*, sufficient to show that two frauds are contemporaneous to succeed in establishing a probative relation between them. This would only tend to show that the defendant was likely to do the act complained of because he had done it before, — which is precisely what the rule of the *res inter alios* seeks to prevent. Such a line of proof substantially amounts to proof of character by specific acts of conduct. Evidence of prior frauds is admitted only when done with a persistent motive, or as part of a systematic plan. In a case where the plaintiffs, who were wholesale merchants, claimed that the defendant had procured a sale to himself of certain goods by fraud and with intent not to pay for the same, it was held error to admit evidence of similar fraudulent representations to other merchants about the same time, unless the transactions should be connected in some particular manner. "The admission of such evidence would introduce a multiplicity of collateral issues, calculated to withdraw the attention of the jury from the real issue in the case; and it would operate unjustly to the defendant, as it requires him to explain his transactions with others, without any notice or opportunity for preparation." *Jordan v. Osgood*, 109 Mass. 457 (1872). After reviewing the authorities, the court in that case (*Jordan v. Osgood*) say: "We think the true rule to be deduced from them is, that another act of fraud is admissible to prove the fraud charged only where there is evidence that the two are parts of one scheme or plan of fraud, committed in pursuance of a common purpose." *Ibid.* *Edwards v. Warner*, 35 Conn. 517 (1869); *Moline-Milburn Co. v. Franklin*, 37 Minn. 137 (1887).

Where, in an action on a life insurance policy, the defence was that the policy was procured by one Hunter on the life of Armstrong for the fraudulent purpose of feloniously killing Armstrong and securing the money from the policy, the benefit of which had previously been assigned to him, it was held that "evidence that he effected insurances upon the life of Armstrong in other companies at or about the same time, for a like fraudulent purpose, was admissible. A repetition of acts of the same character naturally indicates the same purpose in all of them; and if when considered together

they cannot be reasonably explained without ascribing a particular motive to the perpetrator, such motive will be considered as prompting each act." *New York Mutual, &c., Ins. Co. v. Armstrong*, 117 U. S. 591 (1885). In a Virginia case, on an action to cancel a contract for the sale of land alleged to have been procured by the fraudulent misrepresentation of an agent, evidence that the agent made similar representations to others is admissible, not as showing what took place on the particular occasion, but as being "very persuasive of the bent" of the agent's mind. *Wilson v. Carpenter's Adm'r*, 21 S. E. 243 (1895).

So in an action in Michigan, where the issue was whether the sale of a certificate of stock was induced by certain fraudulent representations of a promoter, similar representations to others by the same promoter may be shown. *French v. Ryan*, 62 N. W. 1016 (1895).

On a bill in equity to rescind the purchase of a silver mine on the ground of fraud perpetrated by "salting" the specimens of ore taken by the complainant for assay, evidence is competent that the defendant also "salted" samples used in prior negotiations with other persons for the sale of the same mine. *Mudsill Mining Co. v. Watrous*, 61 Fed. Rep. 163 (1894). To prove that the "salting" was not accidental, evidence is competent that no native silver was found in the samples assayed, but that each one of thirty samples contained powdered silver. *Ibid.* To establish fraud in the importation of certain merchandise, evidence of twenty-nine other invoices imported by the claimant into the same port is admissible "for the purpose of showing the fraudulent intention of the claimant in these importations as well as the present." The supreme court of the United States, speaking by Story, J., say: "Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act taken by itself may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty." *Wood v. U. S.* 16 Peters, 342, 360 (1842). "Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances, as the means of ascertaining the truth." *Castle v. Bullard*, 23 How. 172 (1859).

In cases of fraud, subsequent acts may be shown to establish a prior fraudulent intent. "The subsequent acts are illustrative of the intent and character of the first." *Butler v. Collins*, 12 Cal. 457 (1859).

SKILL.—So in the proof of any other mental state, *e. g.*, the skill needed to do the act alleged to have been done, evidence of acts done at another time may be received.

On an indictment for arson, the government, after showing that the fire was set by the use of a peculiarly constructed box, well

adapted to that purpose and to no other, was permitted to show that a box found a month before, under circumstances showing its use for incendiary purposes, was made at the defendant's shop "to show that he possessed the requisite skill, materials, tools, and opportunity to have made" the box used in the fire in question, and that this was the sole legitimate purpose of the evidence, "unless the jury should find, in the one, such marks as show that one hand must have made both." *Com. v. Choate*, 105 Mass. 451 (1870).

It is immaterial that the proof of a mental state in this way incidentally results in showing the commission of other crimes. *Street v. State*, 7 Tex. App. 5 (1879); *Com. v. Robinson*, 146 Mass. 571 (1888); *State v. Palmer*, 65 N. H. 216 (1889); *R. v. Chasson*, 16 New. Bruns. 546 (1876); *Phillips v. People*, 57 Barb. 353 (1869). If evidence "tends to prove the crime alleged, it is not to be rejected, though it also tends to prove the commission of other crimes, or to establish collateral facts." *Com. v. Choate*, 105 Mass. 451 (1870); *Com. v. Scott*, 123 Mass. 222 (1877); *Com. v. Corkin*, 136 Mass. 429 (1884). The rule is well stated by the supreme court of Missouri in *State v. Tabor*, 95 Mo. 585 (1888). "Evidence of another crime is never admissible unless so connected with the one then being investigated as to show that the commission of the former had something to do with the perpetration of the latter. Unless the apparently collateral crime be brought into a common system, a system of mutually dependent crimes, or unless it be so linked to the crime under trial as to show that the former, though apparently an extraneous offence, is not so in reality, such evidence is not admissible."

(2) TRACING A CONSTANT CAUSE. — A frequent and indeed the usual ground on which facts objectionable as *res inter alios actæ* are admitted to prove intent, knowledge, motive or other mental state is that a constant effect under various circumstances in which one cause alone (the mental state sought to be proved) remains constant strongly tends to show that the mental state is the impelling cause in the case under consideration. This naturally results from the fact that other hypotheses, perhaps at first equally tenable, are being constantly eliminated from the problem. If the case under consideration were alone submitted to examination, it would be difficult (if not impossible) to establish to the required extent the proposition that one among the several possible causes disclosed by the evidence, was the one actually operative. Various other hypotheses would, in all probability, seem equally tenable upon the facts in evidence. But as these facts are varied in other instances and as these instances are multiplied, if the same effect follows it will naturally be found that as instance after instance is added to the scope of the inquiry, one permissible hypothesis after another is being excluded; — until only the mental state alleged remains as a constant cause. This

line of reasoning is in frequent use in other fields of inquiry, and it is doubtful whether the search for truth on many issues involving the existence of a mental state can be profitably prosecuted in any other way.

The same statement will be found to apply to many cases other than those involving the existence of a mental state. Where the effort is made to fix liability for a certain result upon one among several possible causes the same thing is true. Upon the evidence in the case itself, the effort must fail, where other exculpatory theories are deducible from the facts. Among them the cause to which liability is assigned may not stand out with sufficient prominence to sustain the onus of establishing the case. *Ex necessitate rei*, the pleader must proceed to show that in other instances, where different facts existed, the same result followed the presence of the cause for which liability is claimed. Any exculpatory hypothesis must now apply to all the cases, and these will be found to be few and faint; — if, indeed, they exist at all. The process, sufficiently continued, leads to mental certainty.

For example, it is claimed that the plaintiff's horse, when opposite a pile of lumber, which the defendant town permitted to remain near the highway, shied violently, by which damage occurred. The plaintiff's claim is that the pile of lumber frightened the horse, and that permitting such a pile to remain was a defect in the highway. It may be claimed, in defence, that other causes than those inherent in the appearance of the pile of lumber, are responsible for the accident. The time of day, the condition of the weather, the care and skill of the driver, the unsafe character of the horse; — these or other more or less possible causes of the accident may be so left upon the evidence of the particular occurrence as to render it doubtful to which of such causes the injury is fairly to be attributed. If, however, the plaintiff can go forward and show that at all times of the day, in many various conditions of the weather, with many drivers of varying degrees of skill and care, other horses, old and young, kind and vicious, were affected in a substantially similar manner when brought in contact with the same pile of lumber, it is evident that new facts are being shown; — of probative force great in proportion as they exclude the operation of causes other than the nature of the pile of lumber itself.

It may fairly be alleged against this method of proof that it tends to a multiplicity of issues. But this objection is purely a matter for the court, on a fair consideration of what may reasonably be expected to be gained by pursuing such inquiries. As the supreme judicial court of Massachusetts say: "So far as the introduction of collateral issues goes, that objection is a purely practical one, a concession to the shortness of life. When the fact sought to be proved is very unlikely to have any other explanation than the fact in issue, and

may be proved or disproved without unreasonably protracting the trial, there is no objection to going into it." *Reeve v. Dennett*, 145 Mass. 23 (1887).

Reeve v. Dennett (*ubi supra*) is an instance of the application of this rule. The issue was fraud in the sale of shares in a company intended to encourage the use in dentistry of a compound discovered by the defendants called "Naboli." The plaintiff's claim was that this compound was worthless. In reply to this evidence, "the defendant put on a number of his patients, who testified that the defendant's operations upon their teeth, using his invention, were practically painless, whereas similar operations before had been very painful." Held that this was competent: "If a dozen patients should testify that, when the defendant used his naboli, he filled their teeth without hurting them, and that he hurt them a good deal when he did not use it . . . it would go far towards proving that naboli had some tendency to deaden pain. Indeed, the same thing is true in a less degree, if the painful operations were by another hand. Filling teeth, however skilfully done, is generally unpleasant. If it is found to be wholly painless when a certain compound is used, as the witnesses testified, probably the compound is at least in part the cause." *Ibid.*

Where a horse was alleged to have been frightened by steam escaping from the defendant's mill, situated on the margin of the public highway, "witnesses for the plaintiff were permitted to testify that, when travelling by the mill with horses well broken and ordinarily safe, their horses were frightened by the escaping steam. This evidence was limited to a short time before and after the plaintiff's injury, when the mill was in the same condition as when she was injured; and was admitted for the sole purpose of showing the capacity of the escaping steam to frighten ordinary horses." Held, no error. "We think the competency of the evidence rests upon the same principle as evidence, in actions against railroad corporations for damage by fire, alleged to have been set by coals or sparks from a passing locomotive, that the same locomotive, or others similarly constructed and used, have emitted sparks and coals, and set fire at other places and on other occasions. It tends to show the capacity of the inanimate thing to do the mischief complained of." *Crocker v. McGregor*, 76 Me. 282 (1884). So in an action to recover for injuries caused by a defect in a highway where the defence is that the plaintiff was driving at a very high rate of speed, the capacity of the horse for going at that rate of speed may be shown by evidence of recent trials of his speed on a race-track. *Whitney v. Leominster*, 136 Mass. 25 (1883). So in an action against a town for an injury caused by an alleged defect in the highway consisting of a pile of lumber by the side of the road likely to frighten horses, where the defence was that the

plaintiff's horse was vicious and unsafe, evidence is admissible that another horse on driving past this pile of lumber was also frightened by it. *Darling v. Westmoreland*, 52 N. H. 401 (1872). "In this case two primary questions arose, whether the lumber was likely to frighten horses, and whether it did frighten the plaintiff's horse. Was it of such a character, quality and condition, that it could, and probably or manifestly would, be an object of terror to horses in general, or horses of ordinary gentleness or of average skittishness? That was one question. Was the plaintiff's horse frightened by it? That was another and very different question. . . . No one doubts that the fright of the plaintiff's horse was competent evidence on that question (whether the lumber was likely to frighten horses); and, ordinarily, where evidence of one experiment is admissible to show the character of inanimate matter, evidence of two experiments of the same kind is not inadmissible. . . . What rule of law considers the fright of Mr. Darling's horse as important, and disregards the fright of Mr. Fletcher's horse as of no consequence at all?" *Ibid.*

Railroad Cases. — The nature of the questions raised by certain injuries caused by the operation of railroads makes a resort to the evidence of other occasions necessary, while the general regularity of operation and similarity of construction in machinery, &c., which may be presumed to exist under a common and highly systematized management make a resort to such evidence frequently productive of a highly probative effect.

Thus with regard to fires alleged to be communicated by sparks from locomotive engines.

In an action to recover damages to the plaintiff's mill from fire alleged to have been communicated by one of two locomotive engines of the defendant company, on June 7th, 1870, "the plaintiffs were allowed to prove . . . that at various times during the same summer before the fire occurred, some of the defendant's locomotives scattered fire when going past the mill and bridge, without showing that either of those which the plaintiffs claimed communicated the fire was among the number, and without showing that the locomotives were similar in their make, their state of repair or management, to those claimed to have caused the fire complained of." Held, no error. "The question has often been considered by the courts in this country and in England; and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company." *Grand Trunk R. R. v. Richardson*, 91 U. S. 454 (1875); *Koontz v. O. R. & N. Co.*, 20 Oreg. 3 (1890); *Pennsylvania R. R. v. Stranahan*, 79 Pa. St. 405 (1875); *Field v. N. Y. Cen. R. R.* 32 N. Y. 339 (1865); *Cleveland v. Grand Trunk R. R.* 42 Vt. 449 (1869).

So a plaintiff can show that at intervals during a period of four years prior to the setting of the fire in question, coals dropped from the defendant's locomotives had caused fires in the same place and that such locomotives had emitted sparks of sufficient size to set fire to the plaintiff's property. *Longabaugh v. Virginia City, &c. R. R.* 9 Nev. 271 (1874).

So the fact "that fires frequently occurred along the line of railway after the passing of the defendant's trains" is admissible. *Robinson v. New Brunswick R. R.* 23 New Bruns. 323 (1883).

So evidence is competent, in a similar case, that trains frequently set fire to fences and grass at other places in the vicinity of plaintiff's premises during the same autumn. *Kentucky Cen. R. R. v. Barrow*, 89 Ky. 638 (1890). So that within a week before the fire in question the engines of the defendant, in passing, had scattered large sparks which were capable of setting fires to combustible articles along the road, and that frequent fires, occasioned by such sparks, had been put out within that time. *Annapolis, &c. R. R. v. Gantt*, 39 Md. 115 (1873).

"It is competent for the plaintiff to show the emission of sparks or ignited matter from other engines of the defendant, passing the spot upon other occasions, either before or after the damage occurred for which the action is brought, without showing that they were under the charge of the same driver, or were of the same construction as the one occasioning the damage." The actual inquiries were limited to within a month of the fire. *Diamond v. Northern, &c. R. R.* 6 Mont. 580, 586 (1887); *Brighthope R. R. v. Rogers*, 76 Va. 443 (1881).

For similar reasons evidence is admissible "that engines had prior to the fire passed over the road under like conditions of wind, weather, &c., *without* causing fires" on an issue whether there was negligence in causing the fire in question. *Atchison, &c. R. R. v. Stanford*, 12 Kans. 354 (1874).

In a Rhode Island case, evidence of both antecedent and subsequent fires from sparks was held admissible under certain restrictions. "We think there are two purposes for which such testimony may be admissible. The fact that other fires have been communicated before, and especially if recently before, the occurrence of the fire in question, is a fact which should put the company on their guard and stimulate them to increased watchfulness, and therefore testimony relating to such fire might properly pass to the jury, to enable the jury to judge whether, in view of their previous occurrence, the company was, at the time of the fire in question, in the exercise of reasonable care. For this purpose, however, no testimony should pass to the jury relating to fires subsequent to the fire in question, for obviously no such fire could have put the company on their guard against the fire in question. A second purpose for

which such testimony might be admissible is this, namely: to show the possibility of communicating fire by sparks from a locomotive, if any question were made upon that point, and, for this purpose, it would be immaterial whether the testimony related to fires of an earlier or later date than the fire in question. If, however, the possibility were not questioned, and, especially, if it were admitted that the fire so originated, testimony relating to fires of a later date should be carefully excluded as being irrelevant, and as having a tendency to excite prejudice against the company." *Smith v. Old Colony, &c. R. R.* 10 R. I. 22 (1871).

Where "the fatal fire has been set out from a designated engine, it is admissible to introduce evidence of other fires previously set out by the same engine but not by any other engine of the defendant company." *Jacksonville, &c. R. R. v. Peninsular Land, &c. Co.*, 27 Fla. 1, 104 (1891). "Former fires by the same engine are admissible as evidence tending to prove its defective condition or construction, or improper management, and those put out by other engines are excluded because they are matters collateral to the issue and not evidence of the imperfect condition or bad management of the particular locomotive." *Ibid.*; *Ireland v. Cincinnati, &c. R. R.* 79 Mich. 163 (1890).

So where the evidence placed responsibility for the fires on one of two designated engines, fires set by other engines were excluded. "The evidence in this case was circumstantial, and it should not be extended to circumstances which could not have any logical bearing upon the issue. The syllogism that because other locomotives on this road caused other fires at other times in the vicinity, therefore these two locomotives, or one of them, which passed the place at this time, caused this particular fire, would be no more logical than that locomotives on some railway in another state, a thousand miles distant, caused fires in the vicinity of the railway, on account of insufficient manufacture or repair, or other negligence." *Gibbons v. Wisconsin, &c. R. R.* 58 Wisc. 335 (1883).

"The testimony tending to show that other fires were set about the same time by the same engine was competent." *Haseltine v. Concord R. R.* 64 N. H. 545 (1888); *Stertz v. Stewart*, 74 Wisc. 160 (1889). So of fires on the same day and trip. *Lanning v. Chicago, &c. R. R.* 68 Ia. 502 (1886); *Slossen v. R. R.* 60 Ia. 215 (1882).

Where the fire was claimed to have been set by a designated engine, evidence that about the same time other engines had set fires along the defendant's road was excluded as collateral although it was in evidence that all the locomotives on the road used the same kind of spark arresters, and that the designated engine "was a good, safe engine which was supplied with the most approved spark arrester." *Coale v. Hannibal, &c. R. R.* 60 Mo. 227 (1875).

The only authority cited by the court in support of this proposition is *Baltimore, &c. R. R. v. Woodruff*, 4 Md. 242 (1853), which may be considered as overruled.

It has been held that where the emitting of sparks must, according to the testimony, be due to a want of repair in the spark arresters or similar contrivances, it is the duty of the court, before admitting evidence of subsequent fires, to ascertain that the state of repair of the engine is approximately the same on the two occasions. *Collins v. N. Y. Central, &c. R. R.* 109 N. Y. 243 (1888). So in New Hampshire, the qualification is made on the admissibility of evidence of other locomotive fires or sparks that the other engines were of the same construction, used in the same manner, and in the same state of repair. *Boyce v. Cheshire R. R.* 43 N. H. 627 (1862).

Such evidence of other occasions is only admissible where it is necessary to rely on it for the purpose of enabling the plaintiff to prove his case. Where the issue is a simple question of fact to be settled by direct evidence, it is not admissible. Thus on an issue whether the defendant company had set fire to the plaintiff's wharf and lumber-yard by sparks emitted from the smokestack of a steamer, the screens being negligently left open, "evidence of the screens being open and the escape of sparks therefrom on other occasions and at other places than at the time and place in question was inadmissible." *Edwards v. Ottawa River Navigation Co.*, 39 Q. B. U. C. 264 (1876).

So where the facts are capable of being shown to the jury such evidence will not be received. Thus where the question was whether the defendant railroad had left the highway to the plaintiff's tavern in suitable condition evidence that "one or more persons had been upset in driving over the road in question," is not admissible. "The width of the road, the smoothness of its surface, its elevations and depressions, the obstructions remaining thereon and their size and position, are all susceptible of exact admeasurement, and from these facts as disclosed with more or less of accuracy, it will be for the jury to determine how far and to what extent the condition of the road may have been the cause of injury to the party complaining." *Hubbard v. And. &c. R. R.* 39 Me. 506 (1855).

CHARACTER EVIDENCE. — An exclusionary rule characteristic of the English law of evidence is that which, on the question whether a person did or did not do a certain act, withholds from the consideration of the jury the fact that the person alleged to have done or refrained from doing the act in question was of a character such as to make it probable that he did it or refrained from doing it. *Battles v. Laudenslager*, 84 Pa. St. 446 (1877); *Lander v. Seaver*, 32 Vt. 114 (1859); *Soule v. Bruce*, 67 Me. 584 (1877); *McCarty v. Leary*, 118 Mass. 509 (1875); *Jacobs v. Duke*, 1 E. D. Smith, 271 (1851).

Thus, in an action of assumpsit by a physician for services, where the defendant offered evidence of the plaintiff's poor character as a physician, the evidence was held to have been properly excluded. "Character was not put in issue by the nature of this action. . . . The plaintiff is entitled to compensation for his skill and labour whatever they might be." *Jeffries v. Harris*, 3 Hawkes, 105 (1824).

In a civil action for assault and battery evidence of plaintiff's bad character and loose morals is not competent even on the question of damages. *Bruce v. Priest*, 5 All. 100 (1862).

This evidence is not, as a rule, excluded because irrelevant. On the contrary, it is frequently probative in a high degree. Character evidence may, on the other hand, be properly rejected because irrelevant. For example, where a witness had admitted on cross-examination various acts of drunkenness, evidence of a general reputation for sobriety is irrelevant as "it would not have removed the imputation which resulted from his testimony on the stand." *McCarty v. Leary*, 118 Mass. 509 (1875). So where a specific act of negligence is proved, "the question whether it is actionable negligence is to be decided by the character of that act or omission, and not by the character for care and caution that the defendant may sustain," and evidence of defendant's character as a careful man, is immaterial and irrelevant. *Tenney v. Tuttle*, 1 All. 185 (1861).

All that is meant is that the ground for excluding evidence of character is not, primarily, that it is irrelevant.

The reason for the rule is probably to be sought, in part, at least, in that rigor of the early English criminal law code which naturally led to unusual and, perhaps, undue leniency in its administration.

CIVIL CASES. — In a civil action the rule is well settled that neither party is allowed to introduce evidence of good character. Even though the facts savor of criminality, the party affected does not have the option (as in criminal cases) to introduce evidence of his good character. *Boardman v. Woodman*, 47 N. H. 120 (1866); "On principle, as well as authority, evidence of good reputation is not competent to show that one is not guilty of a dishonorable or unlawful act which is not punishable as a crime." *Lamagdelaine v. Tremblay*, 162 Mass. 339 (1894).

So in an action on a policy of insurance, where the defence is fraud, the plaintiff cannot set up evidence of good character. *Fowler v. Aetna Fire Ins. Co.*, 6 Cowen, 673 (1827); "If such evidence is proper, then a person may screen himself from the punishment due to fraudulent conduct, till his character becomes bad. Such a rule of evidence would be extremely dangerous. Every man must be answerable for every improper act; and the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties." *Ibid.*, *Schmidt v. N. Y. &c. Ins. Co.*, 1 Gray, 529 (1854). But see *Spears v. International Ins. Co.*, 1 Baxter, 370 (1872).

So in an action of debt, the plea of fraud does not put in issue the character of the plaintiff. No evidence is admissible regarding it. *Anderson v. Long*, 10 S. & R. 55 (1823); *Dudley v. McCluer*, 65 Mo. 241 (1877). Even if the facts in an action of trespass amount to an embezzlement, evidence of good character is incompetent. *Wright v. McKee*, 37 Vt. 161 (1864).

So on an action for bastardy, character evidence is inadmissible. *Low v. Mitchell*, 18 Me. 372 (1841).

In a civil action for assault with a knife, the defendant offered evidence of his good character as a peaceable and orderly person. In affirming the rejection of the evidence the court say, after a full examination of the authorities, that these authorities "assert two principles. (1) That in civil suits evidence of the character of the parties, except where the character is directly in issue, is not admissible. (2) That putting character in issue is a technical expression, which does not mean simply that the character may be affected by the result, but that it is of particular importance in the suit itself, as the character of the plaintiff in an action of slander, or that of a woman in an action on the case for seduction. The remark of Professor Greenleaf, in his *Treatise on Evidence*, Vol. 1st, sect. 54, that 'generally in actions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it,' is not sustained by any authority which I can find, save *Ruan v. Perry*, 3 Caines (120), and this is expressly overruled in 16 Wend. (646) above referred to." *Porter v. Seiler*, 23 Pa. St. 424 (1854). Speaking of *Ruan v. Perry* (*ubi supra*) the court of appeals say "That case was long since overruled." *Pratt v. Andrews*, 4 N. Y. 493 (1851). This view is concurred in by the court in *Gregory v. Chambers*, 78 Mo. 294, 300 (1883), and *Amer. Fire Ins. Co. v. Hazen*, 110 Pa. St. 530 (1885). But see *Scott v. Fletcher*, 1 Overton, 488 (1812), which follows *Ruan v. Perry*. Evidence of character is incompetent for the plaintiffs in an action on an insurance policy where the defence set up is that the plaintiffs burned their own mill. *Amer. Fire Ins. Co. v. Hazen*, 110 Pa. St. 530 (1885).

So an action of tort for maliciously burning the plaintiff's barn does not put the defendant's character in issue, or enable him to introduce evidence of good character. *Thayer v. Boyle*, 30 Me. 475 (1849).

In an action for slander not imputing a crime, a defence of truth does not entitle the plaintiff in rebuttal to put in evidence of his general good character. *Matthews v. Huntley*, 9 N. H. 146 (1838); *Houghtaling v. Kilderhouse*, 1 N. Y. 530 (1848).

The courts of Vermont admit such evidence in these cases of indirect incrimination on the ground that the incriminating evidence impeaches the character of the plaintiff as a witness for veracity.

"That testimony tending to show that he had sworn falsely upon a material matter then in issue and on trial, would have that tendency cannot be doubted." *Mosley v. Vermont, &c. Ins. Co.*, 55 Vt. 142 (1882).

In Alabama, the rule is laid down that unless character is in issue in a civil case evidence of reputation is incompetent; but that if evidence of bad character is introduced the party assailed may introduce evidence of good character. *Goldsmith v. Picard*, 27 Ala. 142 (1855).

CRIMINAL CASES. — In criminal cases, the defendant is entitled to introduce evidence of his good character, if he desires. Unless and until he avails himself of this option, the government can introduce no evidence that the prisoner's character is bad. *Felsenthal v. State*, 30 Tex. App. 675 (1892); *State v. Merrill*, 2 Devereux, 269 (1829). When the prisoner opens the subject, the government is not only at liberty to meet the defendant's evidence but to prove affirmatively that the defendant has a bad character in relation to the trait involved in the inquiry. *People v. White*, 14 Wend. 111 (1835); *People v. Fair*, 43 Cal. 137 (1872); *Com. v. Hardy*, 2 Mass. 303 (1807).

This disproof of the defendant's evidence of good character must follow the same limitations as the proof itself.

Even when the accused has opened the issue of character, and the government attempts to rebut the evidence offered by the prisoner, "ordinarily such rebutting testimony must be confined to general reputation, and cannot be extended to particular acts." *Holsey v. State*, 24 Tex. App. 35 (1887). So after accused offers evidence of good character as a peaceable and quiet person, the government cannot show that he has been indicted for an assault. *Com. v. O'Brien*, 119 Mass. 342 (1875). Or has drawn his revolver on a certain occasion. *Olive v. State*, 11 Neb. 1, 27 (1881).

By reason of the fact that the legitimate probative effect of character evidence lies in throwing a suspicion upon facts tending to show that a person of excellent moral character should have been guilty of the offence charged, courts have been led to rule that it was of comparatively little value in the case of serious offences. "There are cases of circumstantial evidence, where the testimony adduced for and against a prisoner is nearly balanced, in which a good character may be very important to a man's defence. . . . But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things and beyond common experience; it is so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating upon the human mind; that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations

of a lower grade. Against facts strongly proved, good character cannot avail. . . . But still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer." *Com. v. Webster*, 5 Cush. 295, 324 (1850).

Following the same line of thought, it has been ruled that "evidence of good character in relation to the particular crime charged, seems to be only admissible in cases where the guilt of the party accused is doubtful." *McDaniel v. State*, 8 Sm. & M. 401 (1847); *Bennett v. State*, 8 Humph. 118 (1847); *State v. Ford*, 3 Strob. 517 n. (1849); *Schaller v. State*, 14 Mo. 502 (1851).

Such, however, is not the prevailing rule in the United States.

The ruling in *Com. v. Webster* (*ubi supra*) has frequently been repudiated as unsound. For example, in *Harrington v. State*, 19 Ohio St. 264 (1869), a charge based on *Com. v. Webster* was held erroneous. The court say, "The weight that ought to be given to proof of good character does not depend upon the grade of the crime, but rather upon the cogency and force of the evidence tending to prove the charge, and the motives shown to exist for the commission of the crime by the accused. . . . The reasonable effect of proof of good character is to raise a presumption that the accused was not likely to have committed the crime with which he is charged. The force of this presumption depends upon the strength of the opposing evidence to produce conviction of the truth of the charge. If the evidence establishing the charge is of such a nature as not, upon principles of reason and good sense, to be overcome by the fact of good character, the latter will, of course, be unavailing and immaterial. But the same will be true of any other fact or circumstance in evidence, which, after receiving its due weight, does not alter the conclusion to be drawn from the other evidence in the case. Good character is certainly no excuse for crime; but it is a circumstance bearing indirectly on the question of the guilt of the accused, which the jury are to consider in ascertaining the truth of the charge." *Ibid.*

A ruling that evidence of character is admissible only in a doubtful case, was held erroneous. "In the laws of all civilized countries, under various aspects of the question, good character is recognized as an element, a very potent element of defensive proof, going directly to the credibility of the accusing witness, to the intrinsic value of the inculpatory testimony, to the probabilities of mistaking memory, of mistaken identity, of innocent motives in actions apparently culpable and in many instances amounting in and of itself to a complete defence." *U. S. v. Gunnell*, 5 Mackey, 196 (1886). "Good character is always to be considered. It will of itself sometimes create a doubt where none could exist without it." *People v. Moett*, 23 Hun, 60 (1880). "Evidence of good character is substantive and

must be treated as such; that it is not a mere makeweight to be thrown in to determine the balance in a doubtful case, but that it may, of itself, by the creation of a reasonable doubt, produce an acquittal." *Hanney v. Com.* 116 Pa. St. 322 (1887). "If upon the whole of the evidence introduced, including that of the good character of the defendant, the jury entertain a reasonable doubt as to the defendant's guilt, he should be acquitted." *State v. Douglass*, 44 Kans. 618 (1890).

In Vermont, a ruling that evidence of the defendant's good character was received "as a kind of makeweight in his favor, if there is a pinch in the case," was held to erroneously impress the jury with the idea that the evidence was of no value except where the respondent was entitled to an acquittal without it. "Such evidence is not only useful in cases of doubt, but it is equally so, for the purpose of creating, generating doubts." *State v. Daley*, 53 Vt. 442, 446 (1881). "A long and honorable life must be worth something to a man when accused of a crime in cases other than those where the evidence, independent of his good character, is doubtful or obscure." *State v. Northrup*, 48 Ia. 583 (1878); *Long v. State*, 11 Fla. 295 (1866). Of course, "If the evidence in this case had been so clear, and conclusive as to satisfy the minds of the jury, and leave no doubt as to the guilt of the party, then character, however excellent, could not be considered." *Ibid.*

In Alabama, where evidence of good general character for twenty years was introduced in favor of a person accused of murder, a ruling that "proof of good character, then, is not permitted to go to the jury for the purpose of shielding the defendants from the consequences of their conduct, but simply as a circumstance to be considered by the jury, along with the other evidence in the case," and that if upon all the evidence the jury found the defendants guilty they were to say so "as firmly against a man of good character as of bad," was approved. *Armor v. State*, 63 Ala. 173 (1879). "In all criminal prosecutions, whether of felony or misdemeanor, the accused may prove his good character not only when a doubt exists on the other proof, but even to generate a doubt of his guilt. . . . It does not shield from the consequences of a criminal act, proved to the satisfaction of the jury; though it may raise a reasonable doubt of the act having been done with a criminal intent." *Ibid.*

It abundantly appears from the foregoing cases that the theory on which evidence of good character is admitted in criminal cases on behalf of the accused is, that it renders improbable the evidence tending to show that a man of good character has been guilty of an act involving moral turpitude. It necessarily follows that evidence of the accused's good reputation is of no importance where it can have no such effect. If the criminal act in question is the violation of a municipal ordinance, town by-law, &c., where the act has

no moral quality, the reasons for admitting character evidence cease to apply. So in an indictment for selling liquor to a minor, evidence of the defendant's good reputation for observing the conditions of his license was held properly rejected. "This rule has little or no application to penal acts which have no moral quality, but are merely *mala prohibita*. That one is of good reputation as an honest, peaceable citizen has little tendency to show that he has not violated a statute or ordinance forbidding him to catch trout out of season, or to drive certain vehicles faster than a walk, or requiring him to keep the sidewalks abutting on his premises free from snow and ice. The sale of intoxicating liquor to minors is strictly forbidden by the statute, but it does not necessarily involve any moral turpitude." *Com. v. Nagle*, 157 Mass. 554 (1893).

Failure to offer evidence of character in a criminal case is a fact which may be brought to the attention of the jury. *State v. McAllister*, 24 Me. 139 (1844).

But this view has been strenuously opposed as destructive of the defendant's privilege not to open the issue of character unless he sees fit. Where the government attorney was allowed to comment on the fact that the prisoner had offered no evidence of character, the supreme court of Michigan held that it was "error of the gravest character. No presumption of guilt arises from the fact that a person, when on trial for a crime, fails to call witnesses in support of his good character. This is a privilege which the accused may avail himself of if he chooses. . . . No legal inference can arise from such omission that he is guilty of the offence charged, or that his character is bad." *People v. Evans*, 72 Mich. 367, 382 (1888). The same case holds that the error of permitting such an argument is not cured by an instruction to disregard it; quoting from *Quinn v. People*, 123 Ill. 333, the remarks of the court on the futility of a similar attempt on the part of the trial judge, "As well might one attempt to brush off with the hand a stain of ink from a piece of white linen. One, in the very nature of things, is just as impossible as the other."

The character of a defendant is to be established by reputation before the difficulty arose. He is not to be exposed to the injustice of having the arising of the difficulty assist in proving its truth. *Wroe v. State*, 20 Oh. St. 460 (1870).

Evidence of character subsequent to the doing of the act in question is rejected as "irrelevant and immaterial." *Graham v. State*, 29 Tex. App. 31 (1890); *Carter v. Com.* 2 Va. Cases, 169 (1819). A different rule would expose the defendant to the great danger of having his character ruined or badly damaged by the arts of a popular or artful prosecutor stimulated to activity by the hope of thus making his prosecution successful." *State v. Johnson*, 1 Winsted, (N. C.) 151 (1863).

CHARACTER IN ISSUE. CIVIL CASES.—The rule by no means absolutely excludes evidence of character. It excludes such evidence merely as evidentiary that a person did a certain act because he was of a certain character. In many cases the existence of a particular character is part of the substance of the issue. To such cases the rule has no application.

There are many instances of the application of this principle. For example, in instituting an action for the breach of a promise of marriage a female plaintiff places in issue her character for chastity. *McCarty v. Coffin*, 157 Mass. 478 (1892); *Van Storch v. Griffin*, 77 Pa. St. 504 (1875). To the extent that damages are claimed for injury to reputation, any flaw in the reputation may be shown in mitigation of damages.

The witnesses of such a plaintiff may be asked on cross-examination "respecting the plaintiff's general badness of character" in mitigation of damages. *McGregor v. McArthur*, 5 C. P. U. C. 493 (1856).

So the action for indecent assault puts in issue the plaintiff's character for chastity. *Bingham v. Bernard*, 36 Minn. 114 (1886). In like manner, an action for seduction, being based on the previous existence of chastity in the woman, places such portion of character in issue. *People v. Knapp*, 42 Mich. 267 (1879); *M'Creary v. Grundy*, 39 Q. B. U. C. 316 (1876). For the same reason, in a civil action for damages caused by a rape, the character for chastity of the plaintiff is in issue, and may be impeached by particular acts of misconduct. *Young v. Johnson*, 123 N. Y. 226 (1890.) The further ruling in this case that good reputation for chastity is part of the plaintiff's original case, seems somewhat more doubtful, as a matter of principle.

Evidence of plaintiff's bad character in these actions involving offences against chastity is admissible in mitigation of damages. *M'Nutt v. Young*, 8 Leigh, 542 (1837). "Among the elements of damages is the injury to feelings and the injury to reputation. But both these injuries would be less in the case of a woman of bad reputation than in one of good." *Burnett v. Simpkins*, 24 Ill. 264 (1860).

On the contrary, the Court of Queen's Bench of Upper Canada have ruled that such evidence is inadmissible. *Myers v. Carrie*, 22 Q. B. U. C. 470 (1863).

On an action for libel or slander the character of the plaintiff is in issue. *Peterson v. Morgan*, 116 Mass. 350 (1874); *Holley v. Burgess*, 9 Ala. 728 (1846); *Campbell v. Bannister*, 79 Ky. 205 (1880); *Bodwell v. Swan*, 3 Pick. 376 (1825); *Leonard v. Allen*, 11 Cush. 241 (1853); *Sawyer v. Eifert*, 2 Nott & McC. 511 (1820); *Powers v. Presgroves*, 38 Miss. 227, 241 (1859); *Paddock v. Salisbury*, 2 Cowen, 811 (1824).

It is not necessary that the plaintiff should rest content in relying on the presumption that his reputation was good at the time of the

alleged defamation. He can introduce affirmative evidence to that effect. *Adams v. Lawson*, 17 Gratt. 250 (1867); *Shroyer v. Miller*, 3 W. Va. 158 (1869). So of a plaintiff in a civil action for rape as to her character for chastity. *Young v. Johnson*, 123 N. Y. 226 (1890). The plaintiff in an action of slander can certainly prove a good reputation when it is attacked. *Holley v. Burgess*, 9 Ala. 728 (1846). For example, by evidence of rumors that the alleged slanderous statements were true. *Inman v. Foster*, 8 Wend. 602 (1832). But see *Stow v. Converse*, 3 Conn. 325 (1820), *contra*.

In an action for malicious prosecution, evidence of the plaintiff's general bad character as a horse racer and gambler is admissible. "It would certainly require less stringent proof to make out probable cause for prosecuting such a character for larceny, than one who maintained a good character, and followed an occupation for a livelihood altogether lawful." *Martin v. Hardesty*, 27 Ala. 458 (1855); *Mark v. Merz*, 53 Ill. App. 458 (1893); *Miller v. Brown*, 3 Mo. 94 (1832); *Barron v. Mason*, 31 Vt. 189 (1858); *Gregory v. Thomas*, 2 Bibb, 286 (1811).

The plaintiff, on the other hand, may prove his good reputation as tending to establish his claim that there was no probable cause for the prosecution. "To prove that the attack was originally made without probable cause, we think he should be permitted to show his good reputation known to the defendant when the prosecution was commenced." *McIntire v. Levering*, 148 Mass. 546 (1889); *Bostick v. Rutherford*, 4 Hawks, 83 (1825); *Blizzard v. Hayes*, 46 Ind. 166 (1874); *Woodworth v. Mills*, 61 Wis. 44 (1884); *Israel v. Brooks*, 23 Ill. 575 (1860); *Miller v. Brown*, 3 Mo. 94 (1832); *Rosenkrans v. Barker*, 115 Ill. 331 (1885). Evidence of plaintiff's bad reputation is admissible in malicious prosecution in reduction of damages. *O'Brien v. Frasier*, 47 N. J. L. 349 (1885); *Bacon v. Towne*, 4 Cush. 217 (1849); *Fitzgibbon v. Brown*, 43 Me. 169 (1857); *Gregory v. Chambers*, 78 Mo. 294 (1883), which cites with disapproval the statement in 1 Greenleaf Evidence, § 55, to the effect that character evidence "is not permissible 'in trespass on the case for malicious prosecution.' The single authority cited by him in support of the text is *Gregory v. Thomas*, 2 Bibb, 286. With great respect I submit that the case is no support for the text. . . . The trial court had, under the special plea, admitted evidence of other particular charges of thefts, &c. imputed to the plaintiff. That was held to be error. But the court expressly say: 'We think the court ought not to have permitted the inquiry to have extended further than to the plaintiff's general character.' It is, therefore, an express authority for impeaching the general character." *Gregory v. Chambers*, 78 Mo. 294 (1883); *Rosenkrans v. Barker*, 115 Ill. 331 (1885).

A defendant has been permitted to show, in mitigation of damages, that the defendant's character was bad after the prosecution. If the

prosecution itself caused the bad reputation, damages should be enhanced. *Bostick v. Rutherford*, 4 Hawks, 83 (1825).

In an action against a master for keeping an incompetent servant, traits of character showing incompetency are in issue. *East Line, &c. R. R. v. Scott*, 68 Tex. 694 (1887); *Frazier v. Pennsylvania R. R.*, 38 Pa. St. 104 (1860).

So in an action for false imprisonment, evidence as to the plaintiff's character has been admitted, and evidence of specific acts of misconduct rejected. *Wolf v. Perryman*, 82 Tex. 112 (1891).

Where the issue involves the existence of due care on the part of the plaintiff, evidence of his general character in the particular involved is not admissible. The question is to be "decided by the character of the act or omission, and not by the character for care that the defendant may sustain." *McDonald v. Savoy*, 110 Mass. 49 (1872).

Such evidence of reputation for due care is not admissible; — certainly where the facts have been observed by eye-witnesses. *So. Kans. R. R. Co. v. Robbins*, 43 Kans. 145 (1890).

In a civil case, what portion of a party's entire character may be made the subject of evidence is determined by the pleadings or the nature of the investigation. So in an action for slander in alleging that the plaintiff set fire to a schoolhouse, the defendant in reduction of damages was permitted to introduce evidence of the plaintiff's bad reputation either for integrity and moral worth or in regard to conduct similar to that charged in the slander. *Leonard v. Allen*, 11 Cush. 241 (1853).

CRIMINAL CASES. — The rule excluding character evidence in criminal cases until the defendant opens the issue applies only to the character of the defendant. It may be of the substance of the issue for the government to establish the character of some person other than the accused; and it may be equally open to the defendant to disprove such a character or make its existence doubtful.

For example, on an indictment for carnal knowledge of a girl under sixteen "theretofore chaste," the girl's character for chastity is in issue, and evidence is competent to prove it. *People v. Mills*, 94 Mich. 630 (1893). So on an indictment for rape, evidence is admissible of the character of the prosecutrix for chastity. "The witness must be able to state what is generally said of the person by those among whom he dwells, or with whom he is chiefly conversant, for it is this only that constitutes general reputation or character." *Conkey v. People*, 1 Abb. Ct. of App. Dec. 418 (1860); *O'Brien v. State*, 47 N. J. Law, 279 (1885).

So in an indictment for indecent assault, the accused may show that the reputation of the woman for chastity is bad. *Com. v. Kendall*, 113 Mass. 210 (1873).

So on an indictment of an attempt to commit rape. *Camp v. State*,

3 Kelly, 417 (1847). On an indictment for rape the character for chastity of the prosecuting witness is in issue. Evidence of particular acts of misconduct, sufficiently numerous to be *habitual*, has been admitted. Thus in a New York case, numerous witnesses were allowed to testify that the woman had been "in the habit of receiving men there for the purpose of promiscuous intercourse." It seems probable that the evidence was really received as circumstantially establishing the fact that the woman was a prostitute — "proof more satisfactory than that of a bad general reputation for chastity." *Woods v. People*, 55 N. Y. 515 (1874).

Especially as bearing on the probability of consent, single acts of sexual misconduct have been admitted, in indictments for rape. In Vermont, on such an indictment, a single prior act of illicit sexual intercourse with a person other than the prisoner was admitted, on cross-examination of the woman. As compared with general reputation for chastity, the court say, that "The testimony here offered has practically the same tendency, though inferior in force and conclusiveness." *State v. Reed*, 39 Vt. 417 (1867). So that the complainant had been delivered of a bastard child. *State v. Murray*, 63 N. C. 31 (1868); *State v. Jefferson*, 6 Ired. Eq. 305 (1846). In Illinois the right to prove character by specified acts of incontinence as distinguished from evidence of general reputation for chastity has been denied, though such evidence was admitted for another purpose. *Shirwin v. People*, 69 Ill. 55 (1873). So on an indictment for adultery, the evidence of the complainant may be met by evidence of prior acts of undue intimacy with other men. *U. S. v. Bredemeyer*, 6 Utah, 143 (1889).

So on an indictment for murder, to aid a plea of self-defence the prisoner may prove that the general character of the deceased in the neighborhood where he lived "was that of a turbulent, bloodthirsty, and violent man." *Williams v. State*, 74 Ala. 18 (1883); *Thomas v. People*, 67 N. Y. 218 (1876).

WITNESS. — The character of a witness for truth and veracity may be said always to be in issue. It may be impeached by evidence directed to that point. *Evansich v. R. R.*, 61 Tex. 24 (1884).

The rule applies to the attesting witness to a will. *Chamberlain v. Torrance*, 14 Grant's Chan. Rep. 181 (1868). And to the defendant when offering himself as a witness. *McDonald v. Com.*, 86 Ky. 10 (1887).

Such evidence is confined to character for truth and veracity. *Moreland v. Lawrence*, 23 Minn. 84 (1876); *Shaw v. Emery*, 42 Me. 59 (1856).

A party cannot, in the first instance, sustain himself or other witnesses by proving their good character for truth and veracity until these qualities are directly impeached. A mere conflict of evidence is not sufficient, although of such a nature as to raise a

strong presumption that one side or the other is testifying falsely. *Morgan v. State*, 88 Ala. 223 (1889). As is said in *People v. Bush*, 65 Cal. 129 (1884), "Where witnesses contradict each other, the character of the one is as much impeached as that of the other." *Pruitt v. Cox*, 21 Ind. 15 (1863); *Vance v. Vance*, 2 Metc. (Ky.) 581 (1859); *Saussy v. R. R.*, 22 Fla. 327 (1886); *Tedens v. Schumers*, 112 Ill. 263 (1884); *Sweet v. Sherman*, 21 Vt. 23 (1848); *Stamper v. Griffin*, 12 Ga. 450 (1853).

A similar rule obtains where the contradiction is not between different witnesses, but where evidence is introduced of contradictory statements of the same witness. By the weight of authority, it is not competent for the party offering the witness thus discredited to sustain him by proof of his good general character. *Frost v. McCargar*, 29 Barb. 617 (1859); *Chapman v. Cooley*, 12 Rich. (S. C.) Law, 654 (1860); *State v. Archer*, 73 Iowa, 320 (1887); *Brown v. Mooers*, 6 Gray, 451 (1856); *Stamper v. Griffin*, 12 Ga. 450 (1853).

Many of the earlier cases, relying largely upon 1 Greenl. Ev. § 469, which "is not sustained by the case the author cites of *Rex v. Clarke*, 2 Stark. R. 241, and is not law" [*Brown v. Mooers*, 6 Gray, 451 (1856)], have adopted the opposite view, *i. e.*, that under such circumstances, sustaining evidence of good general character is competent. *Burrell v. State*, 18 Tex. 713 (1857); *Sweet v. Sherman*, 21 Vt. 23 (1848); *Hadjo v. Gooden*, 13 Ala. 718 (1848); *Harris v. State*, 30 Ind. 131 (1868).

And see also *Chamberlain v. Torrence*, 14 Grant's Ch. Rep. 181 (1868), where it is said that as soon as any doubt is thrown on the execution of a deed, the person offering it may give evidence of the good character of the subscribing witness.

PROOF OF CHARACTER GENERALLY. — The proof of character is by proof of general reputation in the community where the person resides. As the Supreme Court of Alabama say, it "is the only mode in which character can be exhibited to us." *Jones v. State*, 76 Ala. 8 (1884); *Bodwell v. Swan*, 3 Pick. 376 (1825).

"It is not competent to show what two or three persons only may think or say concerning the witness, but the inquiry must be confined to the general estimation in which he is held by his neighbors and acquaintances." *Matthewson v. Burr*, 6 Neb. 312 (1877).

"It is a general rule that particular acts are not admissible to sustain an attack upon character." *McCarthy v. Coffin*, 157 Mass. 478 (1892). So in an action for a breach of promise of marriage "an intimacy with several different men" cannot be proved. *Ibid.* In an action for slandering the plaintiff by accusing her of unchastity, evidence is incompetent that others made similar remarks. "Neither can the character of plaintiff for chastity be assailed by this class of testimony. Nothing but general reputation is allowable for such a purpose. It cannot be attacked by proof of particular acts or

particular suspicions." *Proctor v. Houghtaling*, 37 Mich. 41 (1877); *Jones v. State*, 76 Ala. 8 (1884).

"Particular facts are not admissible to prove the reputation of a party or witness to be either good or bad, for the reasons that they do not necessarily tend to establish a general character; that they confuse the jury by raising collateral issues, and especially that a party is presumed to be ready to defend his own general reputation or that of his witnesses, but not to meet specific charges against either without notice." *Nixon v. McKinney*, 105 N. C. 23 (1890); *People v. White*, 14 Wend. 111 (1835); *Campbell v. Bannister*, 79 Ky. 205 (1880); *Kearney v. State*, 68 Miss. 233 (1890).

Though a defendant in an action of slander may show that the plaintiff's character was bad as to the offence charged at the time of the alleged speaking of the words, he cannot show it by rumors current in the community. Such evidence is objectionable as a surprise on the plaintiff, "and besides proof of false rumors alone must of necessity be by hearsay evidence in its most objectionable form." *Peterson v. Morgan*, 116 Mass. 350 (1874); *Holley v. Burgess*, 9 Ala. 728 (1846).

In an action for malicious prosecution, the defendant can introduce evidence of plaintiff's bad reputation in reduction of damages, or as affording probable cause for the prosecution, but he cannot prove individual acts of misconduct. So particular rumors are to be rejected. *Powers v. Presgroves*, 38 Miss. 227, 241 (1859). And what a *minority* of his neighbors say is not competent, though precisely why not, if the evidence is offered in mitigation of damages, is not apparent. *Ibid.* It is not permitted in such a case to show that the plaintiff was seen on the street in bad company, at all hours of the night, swearing louder than other boys. "General reputation, when thus placed in issue may be supported by the party thus attacked by calling witnesses to prove the contrary of the statements of witnesses by which his reputation is attacked. It would be quite difficult to see what proof could have been made to rebut the impression created in the minds of the jury by this testimony." *Dorsey v. Clapp*, 22 Neb. 564 (1887). Evidence tending to show dishonesty has, however, been admitted, though not apparently against objection, as bearing on the question of reasonable cause for suing out a search warrant. In such case the party sought to be impeached may give evidence of his general character. *Mark v. Merz*, 53 Ill. App. 458 (1893).

The fact that no reputation exists on the particular aspect of character is competent evidence. "Such evidence is often of the strongest description, as where a character for truth is in issue, that among those acquainted with the party, it has never been questioned, and so, as to character for peace and quietness, that among those with whom the party associates, no instance has been

known or heard of, in which he has been engaged in a quarrel." *Gandolfo v. State*, 11 Oh. St. 114 (1860); *French v. Sale*, 63 Miss. 386 (1885); *Boon v. Weathered's Adm.* 23 Tex. 675 (1859); *Bingham v. Bernard*, 36 Minn. 114 (1886); *Davis v. Franke*, 33 Gratt. 413 (1880).

The evidence as to the defendant's character in a criminal case must be relevant to the offence with which he is charged, *i.e.*, directed to the particular mental or moral attributes involved in the accusation, otherwise the evidence is without logical force.

On an indictment for felonious assault, evidence of reputation as a law-abiding citizen is inadmissible. "The law limits the inquiry in such cases to his general character as to the trait in issue." *State v. King*, 78 Mo. 555 (1883).

On the other hand, by a parity of reasoning, on an indictment for assault with intent to kill, evidence of character for truth and veracity is incompetent. *Morgan v. State*, 88 Ala. 223 (1889).

On an indictment for murder of a man by his mistress, no evidence of the prisoner's bad reputation for chastity is admissible, "inasmuch as it involves a trait of character not in the slightest degree involved in the alleged commission of the crime with which she stood charged." *People v. Fair*, 43 Cal. 137 (1872).

But it has been held that on an indictment for rape, the defendant may offer evidence tending to show that he is of a good moral character. *State v. Knapp*, 45 N. H. 148 (1863).

On an indictment for larceny evidence of general moral character is incompetent. "General character is shown by general reputation, and not by the particular facts of one's life; but the general reputation may well be confined to the particular traits of character that are supposed to render, to some extent, the commission of the crime charged improbable." *State v. Bloom*, 68 Ind. 54 (1879).

SPECIFIC ACTS. — WHEN ADMISSIBLE. — CROSS-EXAMINATION. — The exceptions to the rule that character must be proved by evidence of general reputation are neither numerous nor important. In attempting to weaken the force of evidence of the defendant's good character in a criminal case, the witnesses in his favor may be asked in cross-examination as to specific instances of misconduct involving the existence of the trait of character in question. "It has been thought useful and favorable to the elucidation of truth in such cases to allow on cross-examination an inquiry as to particulars in the charges and also in reference to the persons who made them, or gave their opinion as to the character of the individual impeached." *Leonard v. Allen*, 11 Cush. 241 (1853); *Sawyer v. Erbert*, 2 Nott & McC. 511 (1820); *Holmes v. State*, 88 Ala. 26 (1889).

Where on an indictment for rape witnesses for the defendant testified to his good character for morality, as well as chastity, "on cross-examination, the State was properly allowed to test their accu-

racy by inquiries as to his reputation for selling liquor in violation of the law ; for the court surely cannot say that such acts are not immoral." *State v. Knapp*, 45 N. H. 148, 157 (1863).

So on an indictment for murder, where a government witness had testified that the reputation of the deceased as a peaceable man was good, the defendant is entitled to inquire, upon cross-examination, whether he had not heard of certain enumerated acts of violence done by the deceased. *De Arman v. State*, 71 Ala. 351 (1882). As the defence was that the killing was in self-defence, the evidence offered was probably admissible on other grounds.

A witness to good character of a deceased person may state in cross-examination "that he did not think that he possessed that high character the latter part of his life." *Nixon v. McKinney*, 105 N. C. 23 (1890).

Evidence of hearsay of specific acts has been admitted in cross-examination of a witness to the defendant's character. For example, on an indictment for murder, a witness testifying to the defendant's character may state that he "had heard for the last few years that defendant had frequent difficulties with, and struck his wife." *Hawes v. State*, 88 Ala. 37, 71 (1889).

REPUTATION IS CHARACTER. — It may well be doubted whether in selecting reputation in the community as the sole permissible proof of character the law uses the only rational means of proof, or even the best. The effort is to prove the existence or non-existence of a mental attribute by circumstantial evidence. The probative success of such an effort rests on a presumption of fact that when a man has a trait of character his neighbors know of it, and sufficiently discuss it to establish a reputation as to its existence. Experience hardly seems sufficiently uniform to lend much weight to such a presumption. Ability to conceal real character is an essential element in the commission of many offences, and dissimulation is sufficiently common to make good standing in a community by no means a reliable, much less a necessary test, of actual character and disposition. On the other hand, suspicion, gossip, unpopularity ; — these and other misfortunes may place a really fair character at great disadvantage when tested by its reputation. A partial explanation of the limitation is found in the historical origin of this species of evidence. Historically considered, it is a final remnant of compurgation, a fact which naturally explains the test of reputation in the community. *Starkie, Evid.* (*76) n. h.

While, under any circumstances, the existence of a certain reputation or the absence of any reputation concerning a particular trait of character is a circumstance of probative value, other (at present prohibited) methods of proving the existence of such traits seem at least of equal value.

Character is a mental or psychical condition. The usual proof of

such conditions is by proof of acts or statements which are their natural expression. That a multiplicity of issues might be thus raised has not sufficed to offset the admitted benefit of receiving this class of evidence in other cases requiring proof of a mental state. The difficulties do not seem greater in the case of evidence of character.

As a general rule, such evidence of specific acts is not admissible. Thus on an action for furnishing a careless conductor, the supreme court of Pennsylvania say: "Character for care, skill, and truth of witnesses, parties or others, must all alike be proved by evidence of general reputation, and not of special acts. . . . Character grows out of special acts, but is not proved by them. Indeed, special acts do very often indicate frailties or vices that are altogether contrary to the character actually established. And sometimes the very frailties that may be proved against a man, may have been regarded by him in so serious a light, as to have produced great improvement of character. Besides this, ordinary care implies occasional acts of carelessness, for all men are fallible in this respect, and the law demands only the ordinary." *Frazier v. Pennsylvania R. R.* 38 Pa. St. 104 (1860); *Nixon v. McKenney*, 105 N. C. 33 (1890). So in an action against an employer for furnishing an incompetent foreman, specific acts of carelessness are incompetent. *Hatt v. Nay*, 144 Mass. 186 (1887).

In several cases, however, such evidence has been received, apparently without objection.

On an indictment for murder a witness to the defendant's character was allowed to testify "He is the most quiet, peaceable boy I ever saw or had. . . . If I spoke roughly to him, it would bring tears to his eyes, but no retort. . . . I never knew him to give an uncivil word to any of them." *Gandolfo v. State*, 11 Oh. St. 114 (1860). "Those acquainted with the party, — with the ordinary course and conduct of his life, would know how far and to what extent he had exhibited or failed to exhibit the quality or trait." *Ibid.*

In an action against a town for a defect in a highway the defence was that the driver, the plaintiff's husband, was fast and careless. Plaintiff was then allowed to testify to his careful driving on several other occasions. "The evidence was relevant to the question of the husband's character for driving safely or otherwise." *Plummer v. Ossipee*, 59 N. H. 55 (1879).

In the case of lower animals, character, when material, may be proved by specific acts of conduct embodying the trait in question.

On an issue whether a certain horse was gentle, evidence of both prior and subsequent conduct on the part of the animal is competent. *Turnpike Co. v. Hearn*, 87 Tenn. 291 (1888), citing with approval *Todd v. Rowley*, 8 All. 51 (1864), where, the character of a horse

being in issue, under similar circumstances, the court say: "The habit of an animal is in its nature a continuous fact, to be shown by proof of successive acts of a similar kind." To the same effect, also in a highway accident case, see *Chamberlain v. Enfield*, 43 N. H. 356 (1861). So in an action against the proprietors of a stage line in providing vicious horses, causing injury to the plaintiff. "The vicious habits of a horse can only be proved by instances. . . . That he had this habit might be proved by instances before and after the accident in question." *Kennon v. Gilmer*, 5 Mont. 257 (1885); *Lynch v. Moore*, 154 Mass. 335 (1891).

Traits of character even of inferior animals, *e. g.* a horse, may, it has been said, also be proved by general reputation. *Wormsdorf v. Detroit &c. Railway*, 75 Mich. 472 (1889).

On the contrary, the supreme court of New Hampshire, in allowing the character of a horse to be shown by specific acts, state that they are not "aware of any authority that would allow evidence of general reputation. The case does not stand like the character of a person for truth, for then it may well be presumed that it cannot be bad without being known to the public, but it may be otherwise in respect to the vicious propensities of the horse." *Whittier v. Franklin*, 46 N. H. 23 (1865).

Where the question relates to the existence of a *habit*, it would seem that, on principle, repeated acts calculated to show its existence are competent. The range of these acts is largely discretionary with the court. They may be "so remote in time or so insignificant in character, as to furnish no aid in deciding the fact to be found." *Com. v. Ryan*, 134 Mass. 223 (1883); *Com. v. Abbott*, 130 Mass. 472 (1881).

Again, upon principle, a further method of proving character would be that those acquainted with the person a particular aspect of whose character is involved, should testify what, in their opinion, was the character of the person, based on their observation. Such evidence is received as to the existence, on a particular occasion, of anger, fright, insanity, and other mental states. It is difficult to assign a satisfactory reason why, for example, a character of proneness to the exhibition of these same mental qualities should not be proved in the same or a similar way.

Such evidence of character by the opinion of the witness has occasionally been received. On an indictment for rape a witness was allowed to state that in his opinion the character for chastity of the prosecuting witness was good. *Conkey v. People*, 1 Abb. Ct. of App. Dec. 418 (1860).

But the rule is well established that the only proper proof of character is by evidence of reputation.

In Mississippi, on an indictment for murder, counsel for the prisoner were not allowed to ask for the prisoner's general char-

acter "for peace or violence" as a preliminary for asking whether from the witness's knowledge of that character he "regarded him as a man of violent or peaceful character." The court thought the second question was correct, but required the counsel to first inquire as to the "general character of the accused." *McDaniel v. State*, 8 S. & M. 401 (1847).

On an indictment for murder in procuring an abortion, a physician cannot be asked, in reference to certain testimony, "if, on that testimony, you would lose faith in the character of any person whose character had heretofore been high in your estimation." *Beasley v. People*, 89 Ill. 571 (1878).

So, on an indictment for murder, where a witness was asked, concerning the defendant, "What is his character for peace and quietness. . . . By character I mean what the man *is*, not what people say about him," the question was held rightly excluded. "If the question 'What the man is?' was intended to . . . require from the witness his *opinion* formed from sources not common to those acquainted with the party, and having no reference to the general character as shown by his ordinary course and conduct, we do not think that the rule has ever been carried so far." *Gandolfo v. State*, 11 Oh. St. 114 (1860). In a suit for damages caused by an incompetent engineer, to show incompetence, the opinion of an expert engineer who had had no previous acquaintance with the engineer as to whose competence he was testifying was offered. The evidence was held properly rejected. "Incompetency cannot be thus established." *East Line &c. R. R. v. Scott*, 68 Tex. 694 (1887).

Such opinion as to the existence of traits of character cannot be said to be excluded because such evidence would not be relevant. The reason assigned is that the rule is otherwise. Of course, in certain cases where the mode of use of an inanimate object is involved, such evidence of opinion would be simply irrelevant. For example, the character of a house in which a certain assault was committed is not a matter for evidence of opinion. *People v. Lock Wing*, 61 Cal. 380 (1882). But the character of a house as being a "lewd house" must be proved by its reputation. *Hogan v. State*, 76 Ga. 82 (1885).

COMMUNITY DEFINED. — The question has naturally arisen in cases where the person whose character is in issue has successively resided in several communities, which community was entitled to speak on the subject of his character. Is it the community where he last resided, where he longest resided, or where he now resides?

The question has received a very sensible answer. Inquiry may be directed to reputation in any community where the party in question has resided for a sufficient length of time to acquire a reputation for the particular trait involved; provided, the time is sufficiently near to the time when the fact is important, to have an

appreciable probative effect. The question of remoteness is a preliminary matter of fact for determination in the discretion of the court. In the absence of surprise, the exercise of this discretion will not be reviewed "unless the circumstances of the case show a gross abuse of this discretion." *Snow v. Grace*, 29 Ark. 131, 141 (1874). In this discretion, evidence of reputation seven or eight years prior to the trial has been received. *Graham v. Chrystal*, 2 Abb. Ct. of App. Dec. 263 (1865).

In *Holsey v. State* 24 Tex. App. 35 (1887) it was held that the reputation of a witness can be proved either "in the community of his residence or where he is best known." "The general reputation of a witness among his neighbors is the only legitimate subject of inquiry. . . . Neighbors are those who dwell near each other; and he who would testify as to the general reputation of a witness must be able to state what is generally said of the person by those among whom he dwells, or with whom he is chiefly conversant." *Waddingham v. Hulett*, 92 Mo. 528 (1887).

So evidence offered of the reputation of the appellant as a witness for truth and veracity in the county of Johnson, where he had lived until four years before, was admitted. "The law does not presume that a person of mature age, whose reputation has been notoriously bad to within a period such as intervened between the time the appellant resided in Johnson County and the time when the witness testified, has so reformed as to have acquired a different reputation. The evidence offered may not have been entitled to so much weight as if it had related to his reputation in the community in which he lived at the time the testimony was given . . . and was subject to be rebutted by evidence showing a different reputation at the time of the trial in the community in which he resided." *Mynatt v. Hudson*, 66 Tex. 66 (1886). The character of a witness may be impeached by persons in whose neighborhood he had lived until four years prior to the trial, though he had then removed to another place fourteen miles from that neighborhood, where he had since resided, and the witnesses did not know the character which he bore at the latter place. "There is a strong probability that one, whose general character was bad four years since, is still of doubtful or disparaged fame. So much, at least, may be asserted, without evincing the feeling of a misanthropist or any unseemly lack of charity." *Sleeper v. Van Middlesworth*, 4 Denio, 431 (1847). So it has been held that reputation in a place where a witness had lived two years before was admissible for purposes of impeachment. *Kelly v. State*, 61 Ala. 19 (1878); *Louisville &c. R. R. v. Richardson*, 66 Ind. 43 (1879). So the inmates of a prison can testify to the reputation of a deceased person as quarrelsome and vindictive in the community where they became acquainted with it, *i.e.*, in the prison itself. *Thomas v. People*, 67 N. Y. 218 (1876). So where a witness

a few months prior to the trial had removed to a new place of residence, where he had not lived long enough to acquire a reputation, evidence of reputation at his former residence was admitted. *Pape v. Wright*, 116 Ind. 502 (1888); *Coates v. Sulau*, 46 Kan. 341 (1891). So evidence of the reputation of a witness two years prior at another place is competent. *Lawson v. State*, 32 Ark. 220 (1877). "General reputation at a former period and in another neighborhood may or may not tend to prove that issue, according to the remoteness of the time and place, and other circumstances. Ordinarily these will affect the weight, but not the competency of the matter." *Brown v. Luehrs*, 1 Ill. App. 74 (1877). Two or three years are not too remote. *State v. Lanier*, 79 N. C. 622 (1878).

On the contrary, where a witness had resided for the last five years in his present residence "and there was abundant evidence as to his reputation," it was held incompetent to inquire as to his character for truth and veracity at the place of former residence. *State v. Potts*, 78 Ia. 656 (1889).

So the character for truth of a witness at a distant place where he has resided but three months on a temporary visit is not competent. "A man's character is to be judged by the general tenor and current of his life, and not by a mere episode in it." *Waddingham v. Hulett*, 92 Mo. 528 (1887).

The reputation of a person among a *minority* of his neighbors is not competent. *Powers v. Presgroves*, 38 Miss. 227, 241 (1859). But it is not necessary that the witness should know that the reputation he states is the opinion of the majority. *Robinson v. State*, 16 Fla. 835 (1878).

The existence of a certain reputation may be circumstantial evidence entirely apart from any effect in proving character. In such cases the rules under consideration have, of course, no application. For example, on the question whether the vendor of a chattel intended to reserve the title in himself, evidence of the poor reputation of the vendee for financial stability is competent. *Buswell Trimmer Co. v. Case*, 144 Mass. 350 (1887). So in an action against an employer for negligence in hiring a fellow servant physically too infirm to safely do his duty, evidence is competent that he "was generally reputed to be infirm in the senses of sight and hearing and in physical strength" . . . "for the purpose of proving that his infirmities in these respects were well known in the community," and that therefore the employer either knew of his condition or with reasonable diligence might have learned. *Monahan v. Worcester*, 150 Mass. 439 (1890).

PROOF OF CHARACTER. WITNESS. — The law is now entirely settled that, as to a witness, the only proper object of inquiry is as to reputation for truth and veracity.

Certain of the earlier cases, indeed, sought to establish the rule that the general moral character of the witness is the preliminary subject of inquiry.

It has accordingly been held that to impeach a witness the proper method "is by asking, first, the question 'what is the witness's general character?' If this is answered that it is bad, then it is followed by the question, 'from his general character would you believe him on his oath in a court of justice?'" Anon. 1 Hill, Law (S. C.) 251, 258 (1833); *State v. Boswell*, 2 Dev. Law (N. C.), 209 (1829); *Stokes v. State*, 18 Ga. 17, 37 (1855); *Hume v. Scott*, 3 A. K. Marsh. 260 (1821); *State v. Stallings*, 2 Haywood (N. C.), 300 (1804); *Cunningham v. State*, 65 Ind. 377 (1879); *Gilliam v. State*, 1 Head, 38 (1858).

In support of this form of interrogation, it has been urged, that if the inquiry be limited to reputation for truth alone, a witness of immorality so notorious that the mere matter of veracity has escaped remark, would stand unimpeached.

In reply, it has been said that "a man who is notoriously immoral, who is believed to be dishonest, and who is addicted to misrepresentation, can never have a good character for truth." *U. S. v. Vansickle*, 2 McLean, C. Ct. 219 (1840).

The position taken in *U. S. v. Vansickle* (*ubi supra*) has been generally approved. The prevailing rule, therefore, is that the deposing witness must first be asked whether he knows the general reputation for truth of the witness sought to be impeached instead of asking for his "general character." "What is wanted is the common opinion, that in which there is general concurrence, in other words, general reputation or character attributed. That is presumed to be indicative of actual character, and hence it is regarded as of importance when the credibility of a witness is in question." *Knode v. Williamson*, 17 Wall. 586 (1873); *Craig v. State*, 5 Ohio St. 605 (1854); *Davis v. Franke*, 33 Gratt. 413, 425 (1880); *U. S. v. Vansickle*, 2 McLean, 219 (1840); *Smith v. State*, 58 Miss. 867 (1881); *Teese v. Huntingdon*, 23 How. 2 (1859).

Where a witness was impeached by evidence of bad general character for honesty, the form of inquiry was held to be error. *Born v. Weathered's Adm.* 23 Tex. 675 (1859); *Craig v. State*, 5 Oh. St. 605 (1854).

A party who takes the stand has the same position as any other witness, and the inquiries are limited to character for veracity and do not extend to general character. *State v. Beal*, 68 Ind. 345 (1879); *Mershon v. State*, 51 Ind. 14 (1875); *State v. Rugan*, 5 Mo. App. 592 (1878).

It is equally well settled that specific instances of untruth or immorality are incompetent to prove the character of the witness for truth and veracity.

The veracity of a male witness cannot be impeached by showing that he is habitually intoxicated. *Thayer v. Boyle*, 30 Me. 475 (1849). Or has indulged in unlawful sexual intercourse. *Cunningham v. State*, 65 Ind. 377 (1879).

Where evidence on behalf of the accused as to his good character for truth and veracity was met by the government by evidence of particular acts of immoral conduct, tending to show low and immoral associations, the court held that "This . . . was clearly illegal evidence." As, however, the evidence as to truth and veracity was itself improperly admitted, the court decline to reverse the judgment. *Morgan v. State*, 88 Ala. 223 (1889). "A witness cannot be impeached by evidence of particular wrongful acts, nor is it proper to question the witness with reference to such matters." *Jones v. Duchow*, 87 Cal. 109 (1890); *U. S. v. Vansickle*, 2 McLean, C. Ct. 219 (1840).

The character for veracity of a female witness cannot be impeached by showing lack of chastity. *People v. Mills*, 94 Mich. 630 (1893); *Camp v. State*, 3 Kelly, 417 (1847); *Johnson v. State*, 61 Ga. 305 (1878); *Jackson v. Lewis*, 13 Johns. 504 (1816); *Spears v. Forrest*, 15 Vt. 435 (1843); *Com. v. Churchill*, 11 Metc. 538 (1846); overruling *Com. v. Murphy*, 14 Mass. 387 (1817); *Dimick v. Downs*, 82 Ill. 570 (1876).

But see *U. S. v. Bredemeyer*, 6 Utah, 143 (1889) where the court apparently decided that on an indictment for adultery, the character of the woman as a witness may be impeached by proof of improper relations with other men. The evidence was admissible, however, on other grounds.

The rule forbidding proof of character by particular instances of conduct, does not interfere with the right, on cross-examination of a sustaining witness to character, to inquire as to such particular instances. *Jones v. State*, 76 Ala. 8 (1884); *Holmes v. State*, 88 Ala. 26 (1889); *Leonard v. Allen*, 11 Cush. 241 (1853); *Steeple v. Newton*, 7 Oreg. 110 (1879). An impeaching witness may be asked, on cross-examination, to state the names of all persons whom he has heard speak against the reputation of the witness impeached. *Bates v. Barber*, 4 Cush. 107 (1849). As the court say in *State v. Perkins*, 66 N. C. 126 (1872), "It is settled that a witness who swears to the general bad character of another witness on the other side, may, upon cross-examination, be asked to name the individuals whom he heard speak disparagingly of the witness, and what was said. This is everyday practice."

Where the attempt is made, on cross-examination, to limit the bad reputation to a particular set of facts, *e. g.*, promises to pay debts, the impeaching party can extend the scope of the bad reputation to the extent of making it general. *Pierce v. Newton*, 13 Gray, 528 (1859).

So the opinion of one witness as to the truthful character of another is not competent.

On the matter of the veracity of a witness, an impeaching witness cannot be asked "From what you know of his reputation, *and what you know of him*, would you believe him under oath in a matter in which he is interested?" The court say "so far as it authorized the witness under examination to base belief on his personal knowledge — as distinguished from general reputation — the question was improper." *People v. Methvin*, 53 Cal. 68 (1878); *Holsey v. State*, 24 Tex. App. 35 (1887); *State v. King*, 78 Mo. 555 (1883).

The preliminary question is whether or not he knows the general reputation for truth and veracity in the neighborhood in which he resides. If he says no, his examination should stop. If he says yes, he should be asked whether that general reputation is good or bad, and whether, from such general reputation, he would believe the person under oath; and the sources and extent of his information may be tested on cross-examination. *French v. Sale*, 63 Miss. 386 (1885). He must answer, as a matter of conscience, if a sufficient number of neighbors have expressed themselves. *Ibid.* *Hamilton v. People*, 29 Mich. 173, 189 (1874); *Wilson v. State*, 3 Wisc. 798 (1854). If the witnesses to character understand the phrase in a general sense, it is not error to omit the word "general" in inquiring for the reputation of the witness. *Coates v. Sulau*, 46 Kans. 341 (1891).

This preliminary question as to whether the second witness knows the reputation of the first, is for the jury and not for the court. *Bates v. Barber*, 4 Cush. 107 (1849).

"It is not like the case of experts, who are called to give opinions, and whose qualifications to give such opinions must be first examined and decided upon by the court. What is the reputation of a witness for truth and veracity, is a simple question of fact; and there is no more reason for the court to make a preliminary examination as to the knowledge of witnesses called to testify to this fact, than there is for making such examination as to the knowledge of witnesses called to testify to any other fact. All witnesses, competent to testify to any fact in the case, are competent to testify to the fact of reputation for truth; and the inquiry as to the amount and means of this knowledge is for the jury, in order to enable them to satisfy themselves as to the weight and importance of the testimony." *Bates v. Barber*, 4 Cush. 107 (1849).

"ENGLISH RULE." — Assuming that the impeaching (or sustaining) witness has answered that he knows the reputation for truth and veracity of the witness sought to be impeached, and has next been asked whether it is good or bad, the point in dispute on the cases is whether the inquiry should stop here or whether the witness should be further asked, "From what you know of this reputation,

would you believe him under oath?" This latter question, if asked, is said to be according to the so-called "English rule."

It is believed that the great preponderance of authority is in favor of this so-called "English" form of interrogation. The great influence of Professor Greenleaf is probably responsible for such conflict as exists. It is said in *Hamilton v. People*, 29 Mich. 173 (1874), "Until Mr. Greenleaf allowed a statement to creep into his work on evidence to the effect that the American authorities disfavored the English rule, it was never very seriously questioned. . . . It is a little remarkable that of the cases referred to to sustain this idea, not one contained a decision upon the question, and only one contained more than a passing dictum not in any way called for."

The reasons in favor of the form of question calling for the opinion of the witness as to the effect on his own mind of the reputation of the impeached witness, are given in this well considered case of *Hamilton v. People*, 29 Mich. 173 (1874). "Unless the impeaching witness is held to showing the extent to which an evil reputation has affected a person's credit, the jury cannot accurately tell what the witness means to express by stating that such reputation is good or bad, and can have no guide in weighing his testimony. . . . It has also been commonly observed that impeaching questions as to character are often misunderstood, and witnesses, in spite of caution, base their answer on bad character generally, which may or may not be of such a nature as to impair confidence in testimony. . . . The objection alleged to such an answer by a witness is, that it enables the witness to substitute his opinion for that of the jury. But this is a fallacious objection. The jury, if they do not act from personal knowledge, cannot understand the matter at all without knowing the witness' opinion, and the ground on which it is based." *Ibid.* The following authorities, among others, follow the English rule. *People v. Davis*, 21 Wend. 309 (1839); *Titus v. Ash*, 24 N. H. 319 (1851); *Lyman v. Philadelphia*, 56 Pa. St. 488 (1867); *Knight v. House*, 29 Md. 194 (1868); *Eason v. Chapman*, 21 Ill. 33 (1858); *Wilson v. State*, 3 Wis. 798 (1854); *Stokes v. State*, 18 Ga. 17 (1855); *M'Cutehen v. M'Cutehen*, 9 Porter (Ala.), 650 (1839); *United States v. Vansickle*, 2 McLean, C. Ct. 219 (1840); *Mobley v. Hamit*, 1 A. K. Marsh, 591 (1819); *Ford v. Ford*, 7 Humph. 92 (1846); *Robinson v. State*, 16 Fla. 835 (1878); *Snow v. Grace*, 20 Ark. 131 (1874).

In a New York case a witness called to sustain a prior witness whose veracity had been attacked, testified that he did not know "from the speech of the people" what the prior witness's character for veracity was. But that he had known him for ten years, knew his character, and had heard it questioned. He was then asked, "From the speech of the people as to his character, would you believe him under oath?" Held to be a proper question. *Adams v. Greenwich Ins. Co.*, 70 N. Y. 166 (1877).

To the same effect is the reasoning in *Ford v. Ford*, 7 Humphrey (Tenn.), 92 (1846): "We think it is proper that the witness should testify as to his own opinion. But this opinion must be the result of his knowledge of the general reputation of the principal witness; not of particular facts, nor of his estimate of the character of the party, founded upon his knowledge of many facts. . . . Rumors may exist, and may acquire a general circulation in a neighborhood, and yet their origin may be so vague, or the sources from which they spring so unworthy of credit, as that the people of the neighborhood may entirely disregard them, and retain the utmost confidence in the party to whom they relate. . . . The party has no such general reputation as that which these rumors, if believed, would give. General reputation is the estimate one's neighbors place upon his character." *Ibid.* *Wike v. Lightner*, 11 S. & R. 198 (1824). "We all know that there are persons so given to apocryphal statements in their common conversation and intercourse with their friends and neighbors, that no one places any confidence in their statements, and this want of truthfulness becomes a subject of common remark among all who know them, still, from their daily walk and conversation in other respects, none would doubt their truthfulness when solemnly called to testify in a court of justice." *Eason v. Chapman*, 21 Ill. 33 (1858). The same rules apply to a party when he takes the stand as a witness. *State v. Beal*, 68 Ind. 345 (1879).

Where a party is a witness the form of the question may be modified as follows. After inquiring as to the general reputation for truth and veracity in the community where he resides, the impeaching witness may be asked, "Whether, from that reputation, he, the witness, would believe him on oath, in a matter in which he was interested." *Knight v. House*, 29 Md. 194 (1868).

Should the sustaining witness, when inquired of as to the reputation for truth and veracity of the first witness, state that he has never heard it questioned, he is entitled, if otherwise competent, to state that he would believe him on his oath. "If such a question was not permitted, the most respectable man in the community might fail in being supported if his character for truth should happen to be attacked." *People v. Davis*, 21 Wend. 309 (1839). But where the second witness said, "I never heard his reputation spoken of. I have heard people say he has lied," it was held that he did not possess the requisite knowledge of the reputation for truth to entitle him to state his own belief in the value of the first witness's oath. "A witness must state his own knowledge of another's general good reputation before he will be permitted to say he would believe him on oath, otherwise he has no legitimate foundation for his belief. In some of the states the secondary question as to belief is not permitted at all." *Lyman v. Philadelphia*, 56 Pa. St. 488 (1867).

Certain American authorities, following the authority of Professor Greenleaf, hold that the only proper inquiries are whether the witness knows the general reputation of the impeached witness for truth and veracity, and if so, what it is. Prominent among these states is Massachusetts.

In that state the usual question is, "What is his general reputation for truth and veracity?" It is discretionary with the court to direct the examining party to first inquire whether the witness knows the reputation. "The practice upon this subject differs in different courts. In this state, no practice is established as a rule of law, but it is within the discretion of the presiding judge to require the preliminary question above stated to be asked of each witness if he shall deem that the interests of justice require it. The same principle is applicable to the examination of witnesses upon other subjects. It often occurs, in the trial of cases, that the judge is called upon to inquire of a witness whether he has knowledge of the matter of which he is called to testify. If it appears to be doubtful whether the witness understands and appreciates his duty to testify only to what he knows of his own knowledge, or if, for any reason, there is danger that he may testify to hearsay, it is the right, and may be the duty, of the presiding judge to inquire of him if he has knowledge of the matter as to which he is asked to testify; and the party calling the witness would not be thereby aggrieved, and no exceptions would lie." *Wetherbee v. Norris*, 103 Mass. 565 (1870); *Quinsigamond Bank v. Hobbs*, 11 Gray, 250 (1858).

The rule is the same in New Jersey. It is not sufficient that the impeaching witness should state that from what he knows of his reputation he would not believe him under oath. "The only testimony allowed in such case is as to the general reputation of the witness impeached, in the neighborhood, for truth and veracity, and that such reputation is generally bad; saying that the witness, from what he knew of his reputation, would not believe him under oath, is not sufficient." *King v. Ruckman*, 20 N. J. Eq. 316 (1869).

And California, "The question of veracity is one of fact for the jury, and it cannot be affirmed, as a legal proposition, that a witness is not successfully impeached, unless the impeaching witnesses testify that, from the general reputation of such witness, they would not believe him or her under oath." *People v. Tyler*, 35 Cal. 553 (1868).

In Texas, the impeaching witness, after stating knowledge as to the first witness's reputation for truth and veracity, "may then properly be asked whether that general reputation is such as to entitle the witness to credit on oath," but not whether he would believe him on oath. *Marshall v. State*, 5 Tex. App. 273, 294 (1878).

The reasons for excluding the final question as to the witness's

belief is thus stated in *Boon v. Weathered*, 23 Tex. 675 (1859), cited with approval in *Marshall v. State* (*ubi supra*). "Where the impeaching witness is asked 'whether or not he could believe the other under oath,' he is more likely to give an answer suggested by his personal knowledge, or prompted by his personal feelings, or his individual opinion, than when he is asked, whether or not he is acquainted with the general reputation of the impeached witness, for truth, and whether it is good or bad."

In Ohio a somewhat similar rule is adopted. The court suggest the following as the proper form of question: "Have you the means of knowing the general reputation of A B, the witness, for truth? Or, this preliminary question may be thus: Are you acquainted with A B, and do you know what is his general reputation for truth? So, any other form of words may be adopted, by which to ascertain whether the witness has sufficient knowledge of the public estimation for truth, in which the witness proposed to be impeached is held." *Craig v. State*, 5 Ohio St. 605 (1854).

REPUTATION ANTE LITEM MOTAM. — The reputation as to veracity is reputation at the time of trial. As bearing on this question, reputation subsequent to the bringing of the suit is competent, though if it arises out of the suit itself its force is naturally much weakened. "A foundation for such evidence must first be laid by showing that the witness has a reputation, that there is a common report as to his veracity; and to determine this, it is proper to show its extent, how it originated, and what originated it, whether in the transaction out of which the controversy arose, or independent of it. If from the controversy itself, and since it commenced, its force and weight would be materially lessened." *Amidon v. Hosley*, 54 Vt. 25 (1882); *Fisher v. Conway*, 21 Kans. 18 (1878).

In New Jersey the courts have gone further, and hold that the reputation of a witness for veracity arising since the controversy, is incompetent. "No rule is better settled, or founded on clearer principles, than that which excludes all testimony touching reputation founded on opinions expressed *post litem motam*. Not only should evidence as to the character of the witness be founded on reputation, previously existing, but a stranger sent by a party to the neighborhood of the witness to learn his character, will not be permitted to testify as to the result of his inquiries." *Reid v. Reid*, 17 N. J. Eq. 101 (1864).

Where evidence of bad reputation of a witness for veracity is received, evidence is competent that prior to a certain event, e. g. his failure in business, it was good. *Quinsigamond Bank v. Hobbs*, 11 Gray, 250 (1858). So where an impeaching witness has stated, in reply to the usual questions, that he could not believe the first witness under oath, he may state further that, laying aside impressions which he received at a certain trial at which the impeached witness

testified, he would believe him under oath. *Titus v. Ash*, 24 N. H. 319 (1851).

WHO MAY TESTIFY. — In *Morgan v. State*, 88 Ala. 223 (1889), a party testified to his own reputation for truth and veracity. The evidence was held incompetent, but not apparently on account of any disability of the witness to testify.

Where the impeaching witness had had no dealings with the principal witness for five years, it was held discretionary with the court to refuse to admit the question. *Teese v. Huntingdon*, 23 How. 2 (1859).

It is not necessary that the second witness should be a member of the community in which the reputation exists. It is sufficient if he knows what it is. *Hadjo v. Gooden*, 13 Ala. 718 (1848). If an impeaching (or sustaining) witness knows the reputation of the first witness where he resides he need not himself be one of his neighbors. That is a circumstance going merely to the weight of his evidence. *Wallace v. White*, 58 Wis. 26 (1883). But "ordinarily, the witness ought to come himself from the neighborhood of the person whose character is in question." *Powers v. Presgroves*, 38 Miss. 227, 241 (1859); *Louisville, &c. R. R. v. Richardson*, 66 Ind. 43 (1879). It is for the jury to judge as to the qualifications of the second witness. If he says he knows the reputation of the first witness he can testify, even if the court thinks differently. *Bates v. Barber*, 4 Cush. 107 (1849). But if the witness does not claim knowledge, his evidence may be excluded. *Com. v. Lawler*, 12 All. 585 (1866); *State v. Perkins*, 66 N. C. 126 (1872).

In the case of *Com. v. Lawler*, 12 All. 585 (1866), the government relied on the evidence of one A. "In order to impeach him, the defendant called a witness, and asked him, 'What is the general reputation of Connell for truth and veracity?' The defendant then asked the several questions following; but all were excluded by the judge. 'Have you heard his character for truth and veracity called in question? If you have heard his character for truth and veracity called in question, state what the common speech of people is as to his character for truth and veracity. What is the general reputation of Connell for truth and veracity, among those who speak of it at all?' The judge ruled that the defendant might ask the witness what was the common speech of people as to Connell's character for truth and veracity, but that the questions in the form put by the defendant were inadmissible." This ruling was sustained on exceptions, the Supreme Judicial Court (Bigelow C. J.) saying, — "The defendant has no valid ground of exception to the ruling of the court. He was permitted to put to the witness the proper inquiry as to the general reputation for truth of the person whose character for veracity he sought to impeach. The questions which were ruled out were calculated to elicit testimony to the

prejudice of the witness offered by the government, from a person who had no actual knowledge of his general reputation for truth. If answered, they might have led to the introduction of evidence of particular instances of prevarication by the government witness, or of doubt as to his truthfulness on some special occasion, without touching his general character for veracity. The rule is perfectly well settled that the evidence must be confined to the general reputation of the witness, and the court did nothing more than hold the party to a strict observance of it, by requiring his questions to be restricted to that form of inquiry solely." *Com. v. Lawler*, 12 All. 585 (1866).

The number of impeaching and sustaining witnesses to credibility may be limited by the sound discretion of the court, to be exercised according as the issue of credibility is important in the case. "It would be absurd to hold, that, upon an enquiry of that sort, depending, in a great measure, upon the opinion of witnesses, a party has the right to examine as many as he pleases, and that the court and jury are bound to sit and hear them, without any power to interfere." *Bunnell v. Butler*, 23 Conn. 65 (1854). In this case the court limited the number to six on each side.

CHAPTER III.

BURTHEN OF PROOF.

§ 364.¹ THE third of the rules² governing the production of evidence is, that *the burthen of proof lies on the party who substantially asserts the affirmative of the issue*. This rule is in the Roman law thus expressed, *Ei incumbit probatio, qui dicit, non qui negat*.³ It has been adopted in practice, not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable ;⁴ and also since it is but reasonable and just that the suitor who relies upon the existence of a fact should prove his own case. In its application, regard must be had to the substance and effect of the issue, and not to its grammatical form ; for in many cases a party, by making a slight alteration in his pleadings, can give the issue a negative or affirmative form at his pleasure.⁵

§ 365. The best tests for ascertaining on whom the burthen of proof lies are, to consider first which party would succeed if no evidence were given on either side ;⁶ and, secondly, what would be the effect of striking out of the record the allegation to be proved. The onus lies on whichever party would fail, if either of these steps were pursued.⁷ Instances in which, on these grounds, averments negative in form must be, nevertheless, proved by the party who asserts such negative, arise in an action for non-compliance with the covenants in a lease, where the breach assigned is that

¹ Gr. Ev. § 74 in part.

² See ante, § 217.

³ Dig. Lib. 22, tit. 3, 1, 2 ; Masc. de Prob. Concl. 70, tot. ; Concl. 1128, n. 10. See Tait, Ev. 1.

⁴ *Dranquet v. Prudhomme*, 1831 (Am.).

⁵ *Soward v. Leggatt*, 1836 (Ld. Abinger).

⁶ *Amos v. Hughes*, 1835 (Alderson, B.) ; *Belcher v. M'Intosh*, 1839 (id.) ; *Doe v. Rowlands*, 1840 (Coleridge, J.) ; *Osborn v. Thompson*, 1839 (Erskine, J.) ; *Ridgway v. Ewbank*, 1839 (Alderson, B.) ; *Geach v. Ingall*, 1845 (id.).

⁷ *Mills v. Barber*, 1836 (Alderson, B.).

the premises were *not* kept in repair, for this allegation must, if traversed, be proved by plaintiff;¹ and in an action where a plaintiff, claiming on a life policy, avers that the insurance was effected on an assertion, made by the insurer, that the insured was not subject to habits or to attacks of illness tending to shorten life, and was in good health, which was true; but the defence is that such statement was false in these respects, namely, that the insured was subject to habits and to attacks tending to shorten life, that is, to habits of intemperance and to attacks of erysipelas, and was ill at the time when the assertion was made, in which case the burthen of proof here again lies upon the plaintiff—since, to entitle him to a verdict, some evidence must be given that the life was insurable at the time when the policy was effected.²

§ 366. Similarly, the burthen of proof lies upon the plaintiff in an action for *not* executing a contract in a workmanlike manner, to which it is pleaded that the work was properly done;³ in an action on a warranty of a horse, where plaintiff alleges that the horse was *not* sound as warranted, and the defendant denies the unsoundness;⁴ in an action against a solicitor for *not* using due diligence;⁵ against a merchant for *not* loading a sufficient cargo on board a ship, pursuant to a charter-party;⁶ against an architect for *not* building houses according to a specification;⁷ and, indeed, in every case in which plaintiff grounds his right of action upon a negative allegation, and the establishment of this negative is consequently an essential element in support of his claim.⁸ The practice in Admiralty is also in accordance with these principles. In a damage suit there, if a defendant, making no charge of negligence against plaintiff, *denies his averments*, and pleads inevitable accident,

¹ Soward *v.* Leggatt, 1836; Doe *v.* Rowlands, 1840 (Coleridge, J.); Belcher *v.* M'Intosh, 1839 (Alderson, B.).

² Huckman *v.* Firnie, 1838; Ashby *v.* Bates, 1846; Geach *v.* Ingall, 1845; Rawlins *v.* Desborough, 1837 (Ld. Denman); Craig *v.* Fenn, 1841 (id.); Pole *v.* Rogers, 1840 (Tindal, C.J.).

³ Amos *v.* Hughes, 1835.

⁴ Osborn *v.* Thompson, 1839 (Ers-
kine, J.); Cox *v.* Walter, undated

(Ld. Denman); S. P. (Tindal, C.J.). In Fisher *v.* Joyce, 1839, Coleridge, J., allowed defendant to begin, but in Doe *v.* Rowlands, 1840, confessed this wrong.

⁵ Shilcock *v.* Passman, 1836 (Alderson, B.).

⁶ Ridgway *v.* Ewbank, 1839 (Alderson, B.).

⁷ Smith *v.* Davies, 1836 (Alderson, B.).

⁸ Doe *v.* Johnson, 1844 (Tindal, C.J.).

plaintiff must begin at the trial.¹ But if, *on the admitted facts*, the onus of proving that there was *no* negligence by him is upon the defendant, he begins.²

§ 367. There are certain exceptions to this general rule that the burthen of proof rests on the party whose assertion, though in form negative, is in substance affirmative. These must now be noticed. The first exception to such rule is that the party who asserts the negative must begin whenever there is a *disputable presumption of law* in favour of an affirmative allegation.³ The presumption, till displaced by direct evidence, serves the party, in whose favour it arises, as well as if he had given express proof. Thus, for instance, where a shipper was charged in a civil action with having shipped dangerously combustible goods without giving notice of their nature, whereby the ship was burnt, as the omission to give notice would have been criminal on the part of the defendant, the law was held to presume that notice had been given, and to thus throw upon the plaintiff the burthen of proving the negative;⁴ in an action by a landlord against a tenant for forfeiture by breach of a covenant to insure, it was held that the law presumed, in favour of the party in possession, that he had satisfied the covenant, and that the non-insurance must therefore be proved by the plaintiff,⁵ and that the landlord could, to relieve himself from the burthen of giving this negative proof, have inserted an express clause to that effect in the lease;⁶ in an action on an insurance on a ship, if the underwriter plead that certain material facts, known to the assured, had been concealed from him, the burthen of proving the non-communication of these facts will, on a reply traversing this the whole statement of defence, be on the defendant; for the presumption of law *primâ facie* is that the assured discharged his duty of communicating all material facts to the underwriter—though the

¹ The Benmore, 1873; The Otter, 1874.

² The Merchant Prince, 1892.

³ It is only with reference to disputable presumptions of law that this rule applies, for if the presumption be conclusive, no evidence at all can be given to rebut it; if it be merely one of fact, the presumption itself does not arise till made by a jury.

See ante, §§ 71, 109, 214—216.

⁴ Williams v. E. India Co., 1802.

⁵ See Toleman v. Portbury, 1869 (Ex. Ch.).

⁶ Doe v. Whitehead, 1838, where refusal to produce the policy or any receipt for premium was held not sufficient proof of an omission to insure.

amount of evidence required to show the contrary will vary according to circumstances. Indeed, *sometimes* very slender evidence will be sufficient, so that, for instance, proof that a ship was known by the assured to have been burnt at the time when the assurance was effected would in itself be reasonable evidence to show that it had not been communicated, because no underwriter, had he been aware of such a circumstance, would have executed the policy.¹

§ 368. A common example of the principle that a person who asserts that which is contrary to a *primâ facie* presumption of law must prove it, is afforded by actions upon bills of exchange, for in these the plaintiff need neither allege nor prove that the bill sued upon was given for good consideration, as, in the absence of evidence to the contrary, the law presumes that fact.² But in an action by indorsee against the acceptor of a bill of exchange, on a defence that the bill was accepted for the accommodation of the drawer, and was indorsed to the plaintiff without value,³ and when it was overdue,⁴ and a reply traversing the latter of these allegations, the burthen of proving that no value was given for the bill, or that it was overdue at the time of indorsement, devolves on the defendant, because the defence does not contain an allegation of any fraud which would counteract the presumption arising from the possession of such an instrument.⁵

§ 369. Where, however, the defendant “taints the bill” (as it is called), that is, shows fraud or illegality *in the original transaction*,—as, for instance, after stating that the bill was originally obtained by fraud or duress, or had been given for gambling purposes,⁶ or had been lost or stolen, he avers that the plaintiff held it without value, and this last fact is traversed,—the plaintiff is required to prove that he gave value, because the presumption of illegality arising from an admitted fraud in the inception of the bill is pre-

¹ *Elkin v. Janson*, 1845 (Parke and Alderson, BB.).

² See 45 & 46 V. c. 61 (“The Bills of Exchange Act, 1882”), § 30. See, also, R. S. C. 1883, Ord. XIX. r. 25.

³ *Mills v. Barber*, 1836; *Whitaker v. Edmunds*, 1834 (Patteson, J.); *Fitch v. Jones*, 1855.

⁴ See (Alderson, B.) *Elkin v. Janson*, 1845.

⁵ *Lewis v. Parker*, 1836; *Jacob v. Hungate*, 1834 (Parke, B.); *Brown v. Philpot*, 1840 (Ld. Denman). See, also, *Smith v. Martin*, 1841.

⁶ The fact that a note was given for a wager on duty subject to fluctuation, does not render the instrument illegal within this rule, for such a wager was only a promise which the law would not enforce: *Fitch v. Jones*, 1855.

sumed to attach to every subsequent holder, and to render him incapable of recovering on such a bill in the absence of evidence showing under what circumstances he became possessed of it.¹ Similarly, if in such a case, whether the action be upon a bill² or upon a note,³ the plaintiff, in answer to such a defence, merely reply a general denial,⁴ and defendant gives evidence of the fraud, as soon as the illegality is proved, the onus of showing that he gave value is cast upon the plaintiff without notice of any fraud.

§ 370. On the same principle, too, that a person who asserts the negative of a legal presumption must begin and prove his denial, if a plaintiff avers that a certain party was, at a specified time, of sound mind, and this averment is traversed by the defendant, the latter is bound to prove the negative allegation of incompetency, for the law presumes every man to be sane till the contrary is shown.⁵ If, however, on the trial of such an issue, the defendant

¹ See cases cited in last four preceding notes. Also 45 & 46 V. c. 61 ("The Bills of Exchange Act, 1882"), § 30, subs. 2; and *Bingham v. Stanley*, 1841, overruling *Ld. Denman's* decision at *Nisi Prius* as reported in 9 C. & P. 374. See, also, *Elkin v. Janson*, 1845 (*Alderson, B.*). See also, however, *Masters v. Barrets*, 1849.

² *Harvey v. Towers*, 1851; *Smith v. Brain*, 1851; *Hogg v. Skeen*, 1865; *Berry v. Alderman*, 1853; *Fitch v. Jones*, 1855; *Mather v. Ld. Maidstone*, 1856; *Hall v. Featherstone*, 1858.

³ *Bailey v. Bidwell*, 1853, overruling *Paterson v. Hardacre*, 1811.

⁴ Which is now the proper pleading: see R. S. C. 1883, Ord. XIX. r. 18; ante, §§ 302, 304.

⁵ See *Sutton v. Sadler*, 1857; *Dyce Sombre v. Troup*, 1856. The proposition stated in the text, that every man is presumed to be sane till the contrary is proved, is doubtless true in criminal cases. It may even be, too, that it is also true in civil cases. But, so far as probate issues are concerned, the cases are conflicting. See a learned note on the whole matter in *Greenleaf on Evidence*, 15th edit. (1892), p. 124. The passage in the text has been allowed to stand, as it appears to express the deliberately

formed opinion of the Author. As to Probate issues, however, many other text books state the law somewhat differently to the proposition in the text above, and in the above cited note to *Greenleaf on Evidence* (a work upon which the present treatise was, originally, to a large extent founded) it is said that, on a question of probate, the burthen of proving that the testator was of sound mind "is, by the better cases, held to rest upon the party propounding the will." The present Editor, while he does not feel justified in altering Mr. Pitt Taylor's text, nevertheless personally agrees in the views expressed in the above cited note to *Greenleaf*, since, in his opinion, the maxim that "every man is presumed to be sane till the contrary appears" does not arise at all, until it has been shown that the individual, whose act is under investigation, was like other men, and, possibly, applies only in criminal cases, while the case of *Sutton v. Sadler* itself shows that a direction to the effect suggested in the text is a misdirection to a jury. As to wills, a contrary rule prevails in Massachusetts. *Crowninshield v. Crowninshield*, 1834 (Am.); and see *Anderson v. Gill*, 1858, *H. L.* (*Ld. Wensleydale*); *Smee v. Smee*, 1879.

puts in evidence an inquisition finding the party lunatic from a date prior to the transaction in question, this evidence, though only *prima facie* and not conclusive, shifts the burthen of proof on the plaintiff, who asserts the party's sanity.¹ Thus, if it be shown that a testator was insane, or even subject to delusions,² at any time prior to the date of an alleged will, or within a few years after that date, the burthen of establishing his testamentary capacity will certainly be shifted on to the party propounding the will.³

§ 371. On the ground that a prosecutor must prove every fact necessary to substantiate his charge against a prisoner, or, in other words, that the law always presumes innocence in the absence of convincing evidence to the contrary, in criminal cases the burthen of proof, unless shifted by legislative interference, always falls on the prosecuting party,—and this though, in order to convict, he must necessarily have recourse to negative evidence. Thus, if a statute, in the direct description of an offence, and not by way of proviso, contain negative matter, the indictment or information must both contain an allegation negating such matter, and the allegation itself must also be supported by *prima facie* evidence.⁴ A better illustration of this principle cannot be given than to point out that the old (and now repealed) statutes made it an offence to either course deer in inclosed grounds without the consent of the owner,⁵ or to cut trees without such consent;⁶ and that the law, having made the absence of consent a material element in such offences, on indictments for them it was necessary both to allege and to prove that the act was done without such consent.

§ 372—374. The Legislature has now, however, in many instances got rid of the necessity for proving negative matter either

¹ *Hassard v. Smith*, 1872.

² *Smee v. Smee*, 1879 (Sir J. Hannen).

³ *Waring v. Waring*, 1848 (Ld. Brougham); *Fowles v. Davidson*, 1848 (Sir H. Fust); *Grimani v. Draker*, 1848 (id.); *Prinsep v. Dyce Sombre*, 1856 (P. C.); ante, § 197.

⁴ *R. v. Jarvis*, 1756; *Taylor v. Humphries*, 1864; *Davis v. Scrace*, 1869; *Morgan v. Hedger*, 1870; *Copley v. Burton*, 1870.

⁵ *R. v. Allen*, 1826; 42 G. 3, c. 107, § 1, repealed by 7 & 8 G. 4, c. 27. Other provisions, omitting all mention of consent, are now substituted by 24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 13.

⁶ *R. v. Hazy*, 1826; 6 G. 3, c. 36, repealed first by 7 & 8 G. 4, c. 27, and, secondly, by 30 & 31 V. c. 59. Other provisions, omitting all mention of consent, are now substituted by 24 & 25 V. c. 97 ("The Malicious Damage Act, 1861"), §§ 20, 21.

by enactments creating the offence afresh, and omitting all mention of the negative matter,¹ but more generally by expressly enacting that the *burthen of proving authority, consent, lawful excuse, and the like, shall lie on the defendant.* Thus, the accused is, by the statutes relating to the offences, bound to protect himself by showing affirmatively the existence of some lawful authority or excuse where he is charged with sundry statutable offences.²

¹ See, for instance, the two preceding notes.

² Amongst such offences are: being found by night in possession of any picklock key, crow, jack, bit, or other implement of housebreaking (24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 58); or buying or selling coin at an undervalue, or exporting or importing, counterfeit coin (24 & 25 V. c. 99 ("The Coinage Offences Act, 1861"), §§ 6, 7, 8, 14, 19); or making, mending, or having possession of, coining tools, or conveying such tools, or any coin or bullion, out of the Mint (24 & 25 V. c. 99 ("The Coinage Offences Act, 1861"), §§ 14, 24, 25; see *R. v. Harvey*, 1871 (C. C. R.)); or having possession of paper, plates, or dies used in connection with the stamp duties (33 & 34 V. c. 98, §§ 18, 22; 54 & 55 V. c. 38 ("The Stamp Duties Management Act, 1891"), § 15); or (being licensed to sell stamps) having possession of any forged stamps (see 54 & 55 V. c. 38, § 18), or any instruments or materials for making either letter stamps (54 & 55 V. c. 38, § 13, subs. 1); or exercise paper (2 W. 4, c. 16 ("The Excise Permit Act, 1832"), § 3; 11 & 12 V. c. 121, § 18), or paper used for making exchequer bills (24 & 25 V. c. 5, § 18; 24 & 25 V. c. 98 ("The Forgery Act, 1861"), § 9), bank notes (24 & 25 V. c. 98 ("The Forgery Act, 1861"), § 14), the notes of private bankers (Id. § 18), or foreign notes (Id. § 19); or for manufacturing paper similar to that used for stamps by or under the Commissioners of Inland Revenue (54 & 55 V. c. 38, § 14; see, also, 24 & 25 V. c. 5, § 18; 24 & 25 V. c. 98 ("The Forgery Act, 1861"), § 10); or having possession of such paper before it has been stamped and issued

for use (54 & 55 V. c. 38, § 15; 24 & 25 V. c. 98 ("The Forgery Act, 1861"), § 11; 24 & 25 V. c. 5, § 19); or engraving bank notes or any part thereof (24 & 25 V. c. 98 ("The Forgery Act, 1861"), §§ 16, 17), the notes of private bankers (Id. § 18), or foreign notes (Id. § 19); or having possession of counterfeit dies for making gold and silver wares, or instruments for making such dies, or any wares of gold, silver, or base metal, having thereon forged dies (7 & 8 V. c. 22 ("The Gold and Silver Wares Act, 1844"), §§ 2, 3); or having possession of hackney-coach and stage plates, or drivers' or watermen's tickets (6 & 7 V. c. 86 ("The London Hackney Carriages Act, 1843"), § 20; and see also 30 & 31 V. c. 134 (amended by 48 V. c. 18), § 17); and certain other cognate offences (see *R. v. Edmundson*, 1859). The law is the same when, on a party being charged with applying any marks appropriated to Her Majesty's stores (38 & 39 V. c. 25 ("The Public Stores Act, 1875"), § 4), or with converting or having in his possession any such stores, when the same are reasonably suspected of being stolen or unlawfully obtained (§ 7; see, also, §§ 8 and 9), proof is given, or an inference raised, that he has acted (*R. v. Wilmett*, 1848 (Coltman, J.); *R. v. Cohen*, 1858 (Watson, B., and Hill, J.); *R. v. Sleep*, 1861) "knowingly;" so, the burthen of proof also rests (*R. v. Banks*, 1794 (Ld. Kenyon)) upon the accused in a prosecution under the direction of the Commissioners of Customs, in respect of goods seized for non-payment of duties, or any other cause of forfeiture, or for recovering any penalty under any Act relating to the customs; on an in-

dictment for making a signal to a smuggling vessel at sea, the defendant (39 & 40 V. c. 36 ("The Customs Consolidation Act, 1876"), § 259) must prove that the signal was not made for the purpose of giving illegal notice (Id. § 191); and goods found or seized under the customs laws will be deemed to be run goods, unless the owner can prove the contrary (Id. § 178). The burthen of justifying his conduct (32 & 33 V. c. 57, §§ 4, 5) also rests upon the defendant in proceedings under "The Seamen's Clothing Act, 1869." So, under "The Foreign Enlistment Act, 1870," where the breach of neutrality charged relates to the delivery of a ship to one of the States (33 & 34 V. c. 90, § 9) at war. So, under "The Merchant Shipping Act, 1894," it similarly rests where a person is charged with sending, or attempting to send, or take a ship to sea in an unseaworthy state so as to endanger life (39 & 40 V. c. 80, § 4); and in such cases the indictment need neither aver that the accused knew the ship was unseaworthy, nor negative the use of reasonable means to insure her going to sea in a seaworthy state: *R. v. Freeman*, 1875 (Ir.). In any prosecution under the Act for preventing accidents by threshing machines, on proof that the machine was not duly fenced while working, the person to whom it belongs, or for whom it has been used, must "satisfy the court that he took all reasonable precautions to ensure the observance of the Act" (41 & 42 V. c. 12 ("The Threshing Machines Act, 1878"), § 1). So, the burthen of proof that he acted innocently lies upon any person charged under "The Army Act, 1881," with illegally purchasing from soldiers regimental necessities, equipment, or stores, or with illegally being in possession of any such articles (44 & 45 V. c. 58, § 156, sub-ss. 1 and 2). Again, a man summoned for being unlawfully in possession of venison, must satisfy the magistrate that he came lawfully by it (24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 14); and one who knowingly and unlawfully has on his premises any tree, shrub, post, pale, rail, or the like, must give a

satisfactory account of how he came possessed of the article found (24 & 25 V. c. 96 ("The Larceny Act, 1861"), § 35). Persons found in possession of, or offering for sale, shipwrecked goods, are bound to show that they have not transgressed the law in taking them (Id. §§ 65, 66). In proceedings against any person for having or keeping an unlicensed theatre, or for acting for hire therein, if it be proved that the theatre is used for the public performance of stage plays, the burthen of proving that it is duly licensed or authorized lies on the accused (6 & 7 V. c. 68 ("The Theatres Act, 1843"), § 17). In an action for a penalty under "The Public Health Act, 1875," for improperly acting as a member of a local board, the burthen of proof is in great measure shifted on to the defendant (38 & 39 V. c. 55, Sch. 2, rule 1, sub-rule 70). In any dispute in the hosiery trade between the manufacturer and the workmen respecting the alleged imperfect execution of any work, which has been delivered to the manufacturer or his agent, the work, if not produced in order to adjudication, will be deemed to have been properly executed (8 & 9 V. c. 77, § 3; 8 & 9 V. c. 128, § 3). So, on a complaint that a person employed in a factory or workshop without a surgical certificate, is under the prescribed age, if the court be of that opinion, the employer shall be liable to penalties, unless he can prove that the party employed is of the age required (41 V. c. 16 ("The Factory and Workshop Act, 1878"), § 92). The proof of the age of the employed also rests upon the defendant in any prosecution of a chimney sweeper for illegally employing a climbing boy (27 & 28 V. c. 37, § 10), and in any proceeding against any person for employing a child in a dangerous performance (42 & 43 V. c. 34, § 4). Similarly, the proof of the dog's age lies on the defendant on the hearing of an information for a penalty for keeping a dog without a licence, where it is said that the animal is a mere puppy (41 V. c. 15 ("The Customs and Inland Revenue Act, 1878"), § 19). A pawnbroker charged with certain offences against "The Pawnbrokers Act, 1872," is required to prove

§ 375. Moreover, as to all cases falling within the Summary Jurisdiction Act, 1879,¹ it is generally provided,² that “any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany, in the same section, the description of the offence in the Act, order, bye-law, regulation, or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required on the part of the informant or complainant.”³

§ 376. The first exception to the general rule that the burthen of proof rests with the party who asserts the substantial affirmative is, then, that it does not apply where there is a *prima facie* presumption of law one way or the other; and it is sufficiently established by the examples which have been cited.

§ 376A. The second exception to the above-named general rule is that where the subject-matter of the allegation *lies peculiarly within the knowledge* of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favour.⁴ For instance,

some lawful or reasonable excuse for his conduct (35 & 36 V. c. 93, § 23, r. 4, and § 31). In most prosecutions for offences against the bankrupt law, the accused may be convicted on the sole proof of his having committed the act charged, “unless the jury is satisfied that he had *no* intent to defraud,” or, “to conceal the state of his affairs,” or, “to defeat the law,” as the case may be (32 & 33 V. c. 62, §§ 11, 12; as amended by 46 & 47 V. c. 52, § 163; 53 & 54 V. c. 71, § 26; 35 & 36 V. c. 57, §§ 11, 12, Ir.). The burthen of showing “any lawful authority or excuse” for his conduct rests upon a person charged with having committed an offence against “The Diseases of Animals Act, 1894” (57 & 58 V. c. 57), §§ 52, 53. See *Huggins v. Ward*, 1882. On a charge against a consumer of fraudulently abstracting gas, “the existence of artificial means” for altering the index to any meter, or for preventing any meter from duly registering, or for abstracting, consuming, or using gas

when such meter is under the consumer’s control, is *prima facie* evidence that such alteration, prevention, abstraction, or consumption has been fraudulently, knowingly, and wilfully caused by the consumer (34 & 35 V. c. 41 (“The Gasworks Clauses Act, 1871”), § 38). In charges against consumers for fraudulently abstracting it, or water supplied by meter (38 & 39 V. c. 55, § 60; 41 & 42 V. c. 52, § 70, Ir.), the burthen of proof also rests with the accused. As to cases under the Pedlars Act, see *infra*, § 375.

¹ 42 & 43 V. c. 49.

² § 39, subs. 2; “The Pedlars Act, 1871” (34 & 35 V. c. 96), § 20, sub-s. 3; 41 & 42 V. c. 52, § 250, Ir., contains a similar provision.

³ See, on the construction of this, *Roberts v. Humphreys*, 1882 (decided on a very similar clause in the Licensing Acts).

⁴ *Dickson v. Evans*, 1794 (Ashurst, J.); *R. v. Turner*, 1816 (Bayley, J.). But see the observations of Alderson, B., in *Elkin v. Janson*,

under the old law, in an action for penalties against a person for practising as an apothecary without a certificate,¹ as the defendant was peculiarly cognizant of the fact whether or not he had obtained a certificate, and, if he had done so, could have no difficulty about producing it, the law compelled him to do so (although, had it not been for the principle in question, the plaintiff would have been bound to prove the negative for two reasons; first, as essential to his case, and secondly, to rebut the presumption of innocence), and in accordance with the principle under consideration it is for him to do so, and not for the plaintiff to prove it non-existent.²

§ 377. This second exception also prevails in all civil or criminal proceedings instituted against parties for doing acts which they are not permitted to do unless duly qualified. It holds good, and compels the defendant to produce the necessary licence or authority (as the case may be), in proceedings for selling liquors, offences against the game laws,³ improperly exercising a trade or profession, and the like;⁴ in actions for penalties against the proprietor of a theatre, for performing dramatic pieces without the written consent of the author;⁵ in proceedings for misprision of treason—where, if the treason be proved, and the knowledge of it be traced to the prisoner, he is, in strictness, bound to negative the averment of concealment by offering proof of a discovery on his part.⁶ It also prevails in the Ecclesiastical Courts, so that, in proceedings against a clergyman for non-residence without licence or exemption, the prosecution need neither allege nor prove that the defendant had not a licence, or that he was not resident on another benefice; but if defendant have a licence he must produce it.⁷

1845, suggesting that the rule only refers to the *weight* of the evidence, but that there should be some evidence to start the presumption and cast the onus on the other side.

¹ Under 55 G. 3, c. 194 ("The Apothecaries Act, 1815"). See, now, 21 & 22 V. c. 90, § 40.

² *Apoth. Co. v. Bentley*, 1824 (Abbott, C.J.).

³ See 1 & 2 W. 4, c. 32 ("The Game Act, 1831"), § 42.

⁴ *R. v. Turner*, 1816; *Smith v.*

Jeffries, 1821; *Hanson's case*, 1821; *Sheldon v. Clark*, 1806 (Am.); *U. S. v. Hayward*, 1815 (Am.); *Gening v. The State*, 1822 (Am.). See, also, *Doe v. Whitehead*, 1838, cited ante, § 367, where this rule was held inapplicable.

⁵ Under 3 & 4 W. 4, c. 15 ("The Dramatic Copyright Act, 1833"), § 2; *Morton v. Copeland*, 1855 (Am.).

⁶ *R. v. Thistlewood*, 1820 (Abbott, C.J., in charge to grand jury).

⁷ *Bluck v. Rackman*, 1840 (P. C.).

§ 378. The third rule governing the production of evidence, namely, that the burthen of proof generally lies upon the party who substantially asserts the affirmative, has now been in itself sufficiently considered. But in connection with this rule questions frequently arise with respect to the *right to begin*. Therefore, it will be well to conclude this chapter with a discussion upon this important subject. This is, indeed, strictly speaking, perhaps a digression from the subject of the chapter, namely, the consideration of the rule as to the Burthen of Proof. Yet it is so intimately connected with the subject, so obviously must be determined with a due regard to the principles contained in this third rule, and so important, that its consideration will certainly not be irrelevant. The "*right to begin*,"—in other words, the privilege of opening the case to the jury—is often one of considerable advantage before any tribunal,¹ but in particular at Nisi Prius. It not only enables a party to create an impression in his favour, which it may be difficult subsequently to erase, but also secures him the last word, in the event of witnesses being called by his opponent. Still, cases sometimes occur where a defendant goes to trial relying simply on the weakness of the plaintiff's case, and where, if called upon to begin, he will instantly be defeated.² The duty of beginning is, consequently, seldom a matter of indifference, but is generally regarded as an object which it is important either to attain or to avoid, according to the circumstances. The principles which govern the question as to who has the privilege or duty (as the case may be) of the "*right to begin*" are difficult of application, and are, moreover, not very distinctly understood, and the decisions as to such right are alike numerous and conflicting. A detailed examination of them all would be out of place here, but a few general rules may, perhaps, be of practical value.

§ 379. The first general rule as to the right to begin is, that

¹ On the hearing of appeals in equity the appellant always used to begin: *Williams v. Williams*, 1866.

² Best "*On Right to Begin*," 27, 28. See, *e.g.*, *Edwards v. Jones*, 1837; where, in an action on a note by indorsee against maker, the plea (in

substance) was want of consideration; the plaintiff having replied, as to part of the sum claimed, that he gave consideration, and as to the residue, *nolle prosequi*, *Alderson, B.*, held that defendant must begin, and as he could not, plaintiff had a verdict.

the party on whom the *onus probandi* lies,¹ as developed on the record, must begin.² It sometimes is said that the right of beginning belongs to the party on whom the affirmative of the issue lies; but this assertion, if literally understood, is by no means accurate, since (as we have seen) it does not apply either where the affirmative allegation is supported by a legal presumption, or the truth of the negative averment is peculiarly within the knowledge of the party who relies on it.³ And the rule as to the *Right to begin* is, in whatever form it may be stated, subject to some exceptions. First, in some cases, if at the trial the defendant will admit the *whole* *prima facie* case of the plaintiff, he will be entitled to begin, provided he was not bound to have made this admission by his pleading at an earlier period. For instance, this is so in a claim by a person as heir-at-law of the person last in possession against a devisee under such person's will, if the defendant admits not only that plaintiff is heir, but that the ancestor, through whom he claims, died seised.⁴

§ 380. The exception will, however, be strictly confined to cases where the defendant admits the *whole title* of the plaintiff. Therefore, if defendant, in an action to recover land, admit at the trial a will under which the plaintiff claims, and rely on a subsequent devise or codicil, he will not be entitled to begin. For so far from admitting the *whole* title of the plaintiff, he would expressly deny a most material part of it, since by setting up a second will or codicil, he would in effect assert that his opponent was not devisee at the time of the testator's decease.⁵ Again, a defendant whose title rests upon a conveyance from the ancestor,⁶ or in part under the ancestor's marriage settlement,⁷ cannot, by

¹ As to the best tests of the *onus probandi*, see ante, § 365.

² Thus, where a husband petitions for a restitution of conjugal rights, a respondent who answers by pleading cruelty is entitled to begin: *Cherry v. Cherry*, 1858.

³ Best "*On Right to Begin*," 29. See ante, §§ 367, 376.

⁴ *Goodtitle v. Braham*, 1792; *Doe v. Brayne*, 1848; *Doe v. Barnes*, 1834 (Ld. Denman). In *Doe v. Smart*, 1835 (Gurney, B., after consulting

Patteson, J.), defendant was allowed to begin, though plaintiff, as to part of the premises, was prepared to prove that he was assignee of an outstanding term. See, now, R. S. C. 1883, Ord. XXI. r. 21, cited ante, § 301, n. 2.

⁵ *Doe v. Brayne*, 1848; overruling *Doe v. Corbett*, 1813, and an anonymous case cited by Ld. Denman in *Doe v. Barnes*, 1834.

⁶ *Doe v. Tucker*, 1830 (Bolland, B.).

⁷ *Doe v. Lewis*, 1843 (Maule, J.).

simply admitting his opponent's heirship and his own possession, deprive the former of his right to begin, because such an admission will not cover the entire title of the plaintiff. Where, too, each party claims as heir-at-law, and the defendant is clearly the heir, *if legitimate*, his admission of a conditional title in the plaintiff, *if the defendant was illegitimate*, is insufficient to give him the right to begin, because the plaintiff, in order to recover, must prove his own title; for although in this particular case the title may depend on defendant's legitimacy, the legitimacy does not constitute the direct issue.

§ 381—2. A second *exception* to the general rule that the party on whom lies the onus probandi, as developed on the record, must begin, is that the plaintiff begins in all actions where he seeks *substantial and unliquidated damages, though the affirmative lie upon the defendant*. This doctrine rests upon the broad principles of public convenience and justice, and was promulgated by a majority of the judges many years back, as applicable to actions for *libel, slander, and injuries to the person*, and extended (in 1845) by a considered judgment of the Court of Queen's Bench.² Its operation was subsequently extended to actions of covenant and assumpsit, and indeed, as it would seem, to *all actions*, where the plaintiff is seeking to recover actual damages of an *unascertained amount*.³

§ 383. This second exception, however, does not extend to cases where the plaintiff seeks to recover a debt, or a liquidated demand in money;⁴ since in such actions, unless a specific denial of the claim be placed on the record, the plaintiff is not required to give any evidence as to its amount. Neither does such exception apply where the damages sought to be recovered, though technically unliquidated, are obviously nominal;⁵ nor where they are admitted

¹ Doe v. Bray, 1828 (Vaughan, B.).

² In Mercer v. Whall, 1845, an action by a solicitor's clerk for wrongful dismissal, which defendant justified by pleading misconduct on his part, plaintiff was held entitled to begin. See judgment therein delivered by Ld. Denman. (Parke, B., never assented to this exception, but was always of opinion that "in all cases

he on whom the burthen of proof lay ought to begin"). See, also, Carter v. Jones, 1833.

³ See Foley v. Tabor, 1861.

⁴ Woodgate v. Potts, 1847 (Parke, B.); Fowler v. Coster, 1828 (Ld. Tenterden); Bonfield v. Smith, 1843; R. S. C. 1883, Ord. XXVII. r. 2.

⁵ Hodges v. Holder, 1813 (Bayley, J.); Jackson v. Hesketh, 1819 (id.).

by the defendant, so far as amount is concerned;¹ nor where they can be ascertained by mere computation, as, for instance, where the action is brought on a bill of exchange or a promissory note;² nor where the plaintiff will not say whether or not he intends to proceed for substantial damages.³

§ 384. A second general rule as to the right to begin is, that *if the record contains several issues, and the burthen of proving any one of them lies on the plaintiff, he is entitled to begin provided he will undertake to give evidence upon it.*⁴ This rule will equally prevail, though it clearly appears, as matter of calculation, that if the defendant should eventually succeed on a certain one of the issues, the proof of which lies upon him, the plaintiff will recover nothing on the issue which lies upon him.⁵ But the proviso at the end of the rule constitutes a material part of it; and, therefore, if a mere claim in general terms for an unliquidated money demand has been added to some special claim for liquidated damages, and the defendant, while confessing and avoiding the special claim for the liquidated amount, specifically denies that made in general terms for the unliquidated amount, such a denial will not entitle the plaintiff to begin, unless in fact he intends to rely on the claim which has thus been made in general terms for an unliquidated amount, and to adduce evidence in support of it.⁶ The effect of the proviso is, in short, this: that it must be the object of an opening to explain to the jury the facts which the witnesses are going to prove.

§ 385. Sometimes the burthen of proof of some one or more issues lies upon the plaintiff, while that of proving others lies upon the defendant. Under such circumstances the plaintiff may (at his own option) either go into the whole case in the first instance, or else elect to only give evidence with regard to those issues which

¹ Tindall v. Baskett, 1861 (Erle, C.J.).

² Cannam v. Farmer, 1849; R. S. C. 1883, Ord. XXXVI. r. 57.

³ Chapman v. Rawson, 1845.

⁴ Rawlins v. Desborough, 1840 (Ld. Denman).

⁵ Cripps v. Wells, 1843 (Rolfe, B.); recognised in Booth v. Millns, 1846.

⁶ Smart v. Rayner, 1834 (Parke, B.); Mills v. Oddy, 1834 (id.); over-

ruling Homan v. Thompson, 1834; Faith v. M'Intyre, 1835; Oakeley v. Ooddeen, 1861 (Byles, J.). See Edge v. Hillary, 1852, where to an action for goods sold, defendant pleaded, except as to 150*l.*, the general issue, and as to that sum a special plea. The plaintiff's particulars limited his demand to 150*l.*, and it was held (Ld. Campbell) that defendant should begin.

he is himself bound to prove, reserving the right of rebutting his adversary's proofs, in the event of the latter establishing a *prima facie* case in support of the issues which lie upon him.¹ The last-named course is, in practice, most usually adopted; and if it is followed, the defendant may have a special reply on the plaintiff's fresh evidence, while the plaintiff will be entitled to the general reply on the whole case. If, however, the plaintiff at the outset thinks fit to call any evidence to repel the defendant's case, he will not be permitted to give further evidence by way of reply; in other words, he "cannot split his case;" since if such a privilege were allowed to a plaintiff, the defendant, in common justice, might claim the same, and the proceedings would run the risk of being extended to a very inconvenient length.²

§ 386. Accordingly, in an action by the indorsee of a bill against the acceptor, where the only issue was on a defence denying the indorsement, the plaintiff was not allowed to rest his case at first on testimony given to identify the indorser's handwriting, and after evidence for the defence had been given to show that plaintiff himself was too poor to have discounted the bill, and that he had disclaimed all knowledge of it, to call by way of reply evidence to show that, in point of fact, plaintiff actually had discounted the instrument.³ A further illustration of the same principle will be found on a later page.⁴

§ 387. The question respecting the right to begin or to reply is a matter of practice and regulation upon which the presiding judge must exercise his discretion. Accordingly, the court will not interfere with his decision, unless it be clearly proved, not only that the ruling on this point was *manifestly wrong*, but that it has occasioned substantial injustice.⁵ It will not grant a new trial,

¹ Formerly, when either by pleading or notice, the defence was known, the plaintiff was bound to open his whole case: *Rees v. Smith*, 1816; but this practice having been found inconvenient, has been abandoned: *Browne v. Murray*, 1825 (Abbott, C.J.); *Shaw v. Beck*, 1853. See *Penn v. Jack*, 1866.

² *Browne v. Murray*, 1825 (Abbott, C.J.); *Sylvester v. Hall*, 1825 (id.). In *Williams v. Davies*, 1833,

a different course was, indeed, permitted; sed qy. if it be allowed now.

³ *Jacobs v. Tarleton*, 1848. See, also, *Wright v. Wilcox*, 1850.

⁴ *Infra*, § 387.

⁵ *Brandford v. Freeman*, 1850; *Edwards v. Matthews*, 1847. See, also, *Burrell v. Nicholson*, 1833 (Ld. Denman); *Bird v. Higginson*, 1834; *Huckman v. Fernie*, 1838; *Doe v. Brayne*, 1848; *Booth v. Millns*, 1846; *Chapman v. Emden*, 1841 (Coleridge,

merely because the judge has either admitted evidence in reply which should in strictness have been produced in support of the plaintiff's original case,¹ or has prevented the plaintiff from calling witnesses in anticipation of the defendant's case, provided such witnesses be subsequently examined in reply.²

§ 387*. The right to begin, however, usually draws after it, both in civil and criminal proceedings, whenever the adversary adduces evidence to the jury in support of his case, *some* right of reply.³ The right of reply thus conferred may be either (a) a right to make a further speech in reply to the adversary's case, or (b) a right to *call evidence* in reply to such case.

§ 387A. With these prefatory remarks, civil and criminal cases must be separately considered.

§ 387B. In civil cases a right even to make a speech in reply is not conferred by the mere commenting on a cash-book, which has been used to refresh the memory of one of the adverse witnesses, or even by a reference to parts of this book, not looked at by such witness,⁴ nor by the production of a paper, which the judge has called for in order to satisfy his conscience.⁵ Neither will the plaintiff be entitled to a speech in reply, because, in the course of the trial, it has become necessary for the defendant to call witnesses to inform *the judge* upon a question respecting the admissibility of evidence.⁶

§ 387c. In criminal cases where several prisoners are jointly indicted, and one of them calls witnesses, the counsel for the prosecutor has a strict right to reply generally, if the charge be a joint one, and the evidence affects the prisoners generally. If, however, the charges be separate (as for stealing and receiving), or the defence be a separate one (as an alibi), counsel for the prosecution has not a general, but only a special, reply, and must in his reply confine his remarks to the case of the party for whom witnesses have appeared.⁷

J.); Doe v. Rowlands, 1840 (id.); Mercer v. Whall, 1845; Geach v. Ingall, 1845 (Pollock, C.B.).

¹ Williams v. Davies, 1833; Doe v. Bower, 1851.

² Smith v. Marrable, 1842.

³ Best "On The Right to Begin," 85, and cases there collected.

⁴ Pullen v. White, 1828 (Best,

C.J.).

⁵ Dowling v. Finigan, 1824 (Best, C.J.).

⁶ Harvey v. Mitchell, 1841 (Parke, B.); Dover v. Maestaer, 1804 (Ld. Ellenborough). See ante, § 23.

⁷ R. v. Hayes, 1838 (Parke, B., and Coltman, J.); R. v. Blackburn, 1853 (Talfourd and Williams, JJ.); R. v.

Again, "if the only evidence called on the part of a prisoner is evidence to character, although the counsel for the prosecution is entitled to the reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper to do so."¹

§ 387D. It has not been clearly decided whether the counsel for the plaintiff or the prosecution will be entitled to reply, if the defendant, *without adducing evidence*, opens new facts; but the better opinion is that no such right can be *claimed*, though the judge may, in a flagrant case, permit its exercise.²

§ 388. As to the nature of the *evidence* which may be called in reply, the remarks made on a previous page to the effect that the party beginning is "not allowed to split his case,"³ must in the first place be borne in mind. Regard also must be had to the circumstances of the individual case, and considerable latitude will necessarily be granted to the judge in the exercise of his discretion.⁴ Thus, where a plaintiff in ejectment made out a *prima facie* case as heir-at-law, which was met by a will being proved for the defendant, he was permitted, in reply, to put in a subsequent will whereby the estates claimed were devised to himself; for although this will proved him to be entitled to the premises as devisee, and thus set up a title different from that on which he originally relied, it operated also as a revocation of the former will, and thus demolished the defendant's case.⁵ Indeed, in one case, where the plaintiff in an accident case originally offered evidence to show that the defendant was at Layton at a given time, and the defendant had called witnesses to show that he was then at Richmond, the judge refused to exclude further witnesses, tendered in reply by the plaintiff to prove that the defendant was not at Richmond, but at Layton, at the time in question.⁶ On the other hand, where the

Jordan, 1839 (Williams, J.); *R. v. Trevelli*, 1882 (Hawkins, J.); *R. v. Kain*, 1883 (Stephen, J.).

¹ Resolution of the judges, 1837, reported 7 C. & P. 676.

² *Crerar v. Sodo*, 1827 (Ld. Tenterden). See, in favour of the right, *R. v. Horne*, 1777; *R. v. Bignold*, 1824 (Abbott, C.J.); *R. v. Carlile*, 1834 (Park, J.); Best "*On The Right to Begin*," 92—94; against it, Best, id. 94—99; *Faith v. M'Intyre*, 1835

(Parke, B.); *Stephens v. Webb*, 1835; *R. v. Abingdon*, 1794 (Ld. Kenyon); *Naish v. Brown*, 1846 (Pollock, C.B.).

³ *Supra*, § 38.

⁴ *Wright v. Wilcox*, 1850.

⁵ *Doe v. Gosley* (Ld. Denman). Sed qu. as to the present practice. See R.S.C. 1883, Ord. XXI. r. 21, and Ord. XXIII. r. 6, cited ante, § 301.

⁶ *Briggs v. Aynsworth*, 1838 (Ld. Denman). This case certainly carries the privilege of adducing evidence

issue was as to the soundness of a horse, which was exhibited to the jury during the defendant's case, the plaintiff was not allowed to recall his veterinary witnesses, who had possessed an opportunity of inspecting the horse before the plaintiff's case had been closed, but had only seen him on the view in question, to give their opinion respecting his soundness.¹

§ 389. In civil cases in which evidence is taken by affidavit under R. S. C. 1883, Order XXXVIII., it is expressly provided by R. 27,—in accordance with the practice described in the preceding section,—that the plaintiff's affidavits in reply “shall be confined to matters *strictly in reply*.”²

§ 390. With regard to the nature of the evidence which may be called in reply in criminal cases, sufficient guide will for the most part be obtained from what has already been said as to the practice in civil cases. But in criminal cases it is further a rule that on the trial of *public prosecutions*, whether for felony or misdemeanor, *directly instituted by the Crown*, and conducted personally by the law officers of the Crown, but not on prosecutions merely directed by them,³ such law officers are in strictness entitled to reply, even if no evidence be adduced on the part of the defendant.⁴ As, however,

in reply to its extreme limit; for although the plaintiff was at liberty to disprove the alibi by showing that the defendant was not at Richmond, yet when the witnesses went on to prove that he was at Layton, they they not only gave evidence which ought to have been submitted to the jury in the first instance, but confirmed that which was actually given in chief, and which, consequently, should have been then exhausted (see note *a* to S. C. pp. 169, 170.)

¹ Osborn v. Thompson, 1839 (Erskine, J.).

² But this rule appears to have been disregarded in *Peacock v. Harper*, 1878. Sed qu.

³ By a resolution of the judges come to in 1887, and reported in 5 St. Tr. N. S. p. 34, it was resolved: “That in those Crown cases in which the Att.-Gen. and Sol.-Gen. is personally engaged, a reply, where no witnesses are called for the defence, is to be allowed, as a right, to the

counsel for the Crown, and in no others.” It had before this, in *R. v. Christie*, 1858, been held that the privilege does not extend to the Att.-Gen. of the County Palatine, and that where such prosecution was not conducted by a law officer in person, it did not extend to a prosecution directed by the Poor Law Board: *R. v. Beckwith*, 1858 (Byles, J.); but that it did apply to Post-Office Prosecutions, and that it extended to the Sol.-Gen., as well as to the Att.-Gen.: *R. v. Toakley*, 1866 (Mellor, J.); *R. v. Barrow*, 1866. With respect to the Att.-Gen. of the Prince of Wales, see *Att.-Gen. of P. of Wales v. Crossman*, 1866. The authorities as to the Att.-Gen.'s right of reply are collected 2 St. Tr. N. S. 1019.

⁴ Resolution of the judges in 1837, reported 7 C. & P. 676: *R. v. Horne*, 1777 (Ld. Mansfield); *R. v. Marsden*, 1829 (Ld. Tenterden). The same unjust rule prevails in the Revenue side of the Queen's Bench Div. in all cases

this is a privilege, or rather a prerogative, opposed to the ordinary practice of the courts, and is, emphatically, "more honoured in the breach than the observance," it should be watched with jealousy. Mr. Horne, in 1777 observed, that the Attorney-General would be grievously embarrassed to produce a single argument of reason or justice on behalf of his claim.¹ As the rule which precludes the counsel for the prosecution from addressing the jury in reply, when the defendant has called no witnesses, has been long thought to afford the best security against unfairness in ordinary trials, a natural suspicion arises that a contrary rule may have been adopted, and may *still* be followed, in State prosecutions, for a less legitimate purpose. It is to be hoped that, ere long, the Legislature will interfere, and introduce one uniform practice in the trial of political and ordinary offenders.²

where the Crown is concerned : M. of Chandos v. Comrs. of Inl. Rev., 1851.

¹ 1777, 20 How. St. Tr. 663.

² Those who wish for further in-

formation respecting the subjects discussed in this chapter are referred to to Mr. Best's work "*On The Right to Begin*."

AMERICAN NOTES.

Burden of Proof. — In the law of evidence this phrase means one of two distinct things. "Proof" means either (1) "proving," or (2) evidence to prove. In other words, either the result of evidence, in producing affirmative belief, or the means used in producing that result. Therefore, it means either a mental state or the means of producing one. When incorporated into the phrase "burden of proof," and the latter applied to the trial of causes, where an issue has been raised as to the existence of a particular fact or facts, the phrase necessarily means (1) The duty of creating by a certain preponderance an affirmative belief on the part of the tribunal in the existence of the fact or facts in issue, or (2) The duty of introducing the evidence necessary to establish facts which produce or prevent such affirmative belief. That these two burdens are distinct from each other; that they may and often do rest at particular times on different parties to the litigation, is perhaps obvious. It is, however, rather the rule than the exception that they are suitably distinguished in practice. It seems advisable, therefore, to consider their respective differences.

(1) **BURDEN OF ESTABLISHING.** — With the placing of this *onus* the rules of evidence have nothing whatever to do. It has been determined before the time comes for the use of evidence by the issue as raised by the pleadings. Under the established rules of pleading, the parties litigant have formed an issue of fact:—an allegation of fact asserted by one party and denied by the other. One party has, therefore, assumed, by asserting the truth of a contested fact, the affirmative of the issue. By so doing, he has, as a matter of substantive law (not under a rule of evidence), undertaken the responsibility of resting the result of the entire case upon his ability to produce in the minds of the tribunal, by a certain required preponderance of evidence, an affirmative belief in the existence of the fact or facts which he has asserted and his opponent has denied. In other words, he must prove his case. He has assumed the burden of establishing it. There is no such burden on the other side. If that interest can merely prevent the necessary affirmative belief by the party having this burden of establishing, it succeeds. All this has nothing to do with the rules of evidence. As a matter of pleading or substantive law, whoever substantially has the affirmative of the issue as determined by the pleadings, has the burden of establishing his case.

"He who affirms must prove." *Blanchard v. Young*, 11 Cush. 341, 345 (1853); *McClure v. Pursell*, 6 Ind. 330 (1855); *Seavy v. Dearborn*, 19 N. H. 351 (1849); *Southworth v. Hoag*, 42 Ill. 446 (1867); *Gizler v. Witzel*, 82 Ill. 322 (1876); *Oakes v. Harrison*, 24

Ia. 179 (1867); *Royal Ins. Co. v. Schwing*, 87 Ky. 410 (1888); *Scott v. Wood*, 81 Cal. 398 (1889); *Heinemann v. Heard*, 62 N. Y. 443, 455 (1875); *Clark v. Hills*, 67 Tex. 141 (1886); *East Tennessee, &c. R. R. v. Stewart*, 13 Lea, 432 (1884); *Estate of Ehle*, 73 Wis. 445, 458 (1889); *Roche v. Fraser*, 7 Low. Can. Rep. 472 (1858); *Lehman v. McQueen*, 65 Ala. 570 (1880); *McQueen v. People's Bank*, 111 N. C. 509 (1892); *Kent v. White*, 27 Ind. 390 (1866); *Moffet v. Moffet*, 90 Ia. 442 (1894); *McKenzie v. Stretch*, 48 Ill. App. 410 (1892); *Youn v. Lamont*, 56 Minn. 216 (1894).

So where the defence to a promissory note is payment, the burden of establishing is on the defendant. *Kendall v. Brownson*, 47 N. H. 186 (1866). So where the defence is the existence of fraud known to the plaintiff. *Reeve v. Liverpool, &c. Ins. Co.*, 39 Wis. 520 (1876). The same rules as to the effect of the pleadings to determine the burden of establishing obtain in equity, as at law. *Pusey v. Wright*, 31 Pa. St. 387 (1858). "In both, the party maintaining the affirmative of the issue has it cast upon him." *Ibid.* "It is an established rule of evidence in equity, that where an answer which is put in issue, admits a fact, and insists upon a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved; otherwise the admission stands as if the fact in avoidance had not been averred." *Clements v. Moore*, 6 Wall. 299, 315 (1867); *McGhee Irrigation Ditch Co. v. Hudson*, 85 Tex. 587 (1893).

In what particular instances the burden of establishing is on the plaintiff or on the defendant is not a question in the law of evidence. The affirmative of the issue may, as a matter of pleading, rest upon the defendant when equally satisfactory *a priori* reasoning would place it upon the defendant. As is said in *Starratt v. Mullen*, 148 Mass. 570 (1889): "Undoubtedly many matters which, if true, would show that the plaintiff never had a cause of action, or even that he never had a valid contract, must be pleaded and proved by the defendant; for instance, infancy, coverture, or, probably, illegality." See also *Sparks v. Sparks*, 51 Kans. 195 (1893). But with all this the law of evidence is not directly concerned. Evidence takes up the procedure of the trial where pleading leaves it. Indeed Bentham says with great truth (*Works*, Vol. VI. p. 214): "This topic . . . *onus probandi* . . . seems to belong rather to Procedure than to Evidence." Evidence is limited to facts from which a judicial tribunal may infer the existence of a fact in issue. The definition, therefore, excludes mere argument. Yet the burden of establishing, fixed and unshifting, lies upon the party who has the affirmative of the issue, during the stage of argument, after the evidence is all in, and throughout much legal reasoning, whether relating to rules of law or issue of fact. Therefore while burden of proof concerns the law of evidence, it concerns it merely because evidence is part of the law of procedure.

Where a party has assumed without objection the burden of establishing in the trial court, he will not be permitted to contend in the upper court that he wrongfully assumed that burden. *Benjamin v. Shea*, 83 Ia. 392 (1891).

The burden of establishing may involve proof of negative averments or facts.

"Whilst the party having the affirmative of the issue holds the burden of proof, as a general rule it is not necessary that the issue should always be presented in an affirmative form. If this were requisite, a mere change in the form of the issue would change the burden of proof, without regard to the substance and effect of the issue." *Clark v. Hills*, 67 Tex. 141 (1886).

So in an action for malicious prosecution, the plaintiff must show that the proceedings were instituted *without* probable cause. *King v. Colvin*, 11 R. I. 582 (1877); *Ames v. Snider*, 69 Ill. 376 (1873); *Smith v. Zent*, 59 Ind. 362 (1877).

In an action for negligence the plaintiff may be required to show that certain warnings were *not* given. *Greany v. Long Island R. R.*, 101 N. Y. 419 (1886). On a complaint against the keeper of a billiard table for allowing a minor to play billiards at his table *without* the consent of his parent or guardian, the burden of proving that the parent or guardian did not consent is on the State. *Conyers v. State*, 50 Ga. 103 (1873). So in an action against a surety on a note, where the surety has given notice of his intention not to continue liable, the burden of proof is on the plaintiff to show that the money could *not* have been collected if suit had been brought when notice was given. *Strickler v. Burkholder*, 47 Pa. St. 476 (1864).

In like manner, on a bill in equity to cancel a deed, on the ground that it was never executed, it is incumbent on the complainant to prove the negative allegation. *Kerr v. Freeman*, 33 Miss. 292 (1857).

So in an indictment for selling liquor to a slave without an order from his owner, it is the duty of the State to prove that no order was given. *State v. Evans*, 5 Jones, 250 (1858). In an indictment for selling goods *not* of the growth, produce, or manufacture of the state, the burden is on the government to prove this negative averment. *State v. Hirsch*, 45 Mo. 429 (1870). So on an indictment for selling goods *not* the produce or manufacture of the United States. *Com. v. Samuel*, 2 Pick. 103 (1824). So where a statute gave a civil remedy for cutting logs *without* the owner's consent, the plaintiff must show affirmatively the absence of such consent. *Little v. Thompson*, 2 Greenl. 228 (1823). But see to the contrary effect, *Welsh v. State*, 11 Tex. 368 (1854).

But while the onus of establishing may include proof of negative averments, it does not follow that the same cogency of proof is required as in proving positive allegations.

On a bill in equity for the cancellation of an agreement in writing on the ground that certain representations were false and fraudulent, and the plaintiff's burden of establishing involved proof of certain negative averments, viz.: that one Lea had *not* invented a new and improved process for making iron and steel; had *not* taken out a *caveat* on the same, and had *not* transferred the same to a certain company, the court say: "The degree of proof of a negative allegation is seldom measured by that required of an affirmative allegation. In some cases a negative may be positively and conclusively proved, . . . but in many cases this is impossible, and hence the amount of proof required to support the negative proposition and to shift the burden will vary according to the circumstances of the case; and very slight evidence will often be sufficient to shift the burden to the party having the greatest opportunities of knowledge concerning the fact to be inquired into." *Kelley v. Owens* (Cal.), 30 Pac. Rep. 596 (1892).

Where the burden of establishing involved proof of a negative allegation, viz., that no alluvion existed at a certain time susceptible of private ownership, the court hold: "Inasmuch as this involves the proof of a negative and is an exception to the general rule that the party holding the affirmative must prove it, demonstrative evidence is not required, and the burden of proof may be shifted when sufficient facts are established to raise a strong presumption in favor of the negative." *Succession of Delachaise v. Maginnis*, 44 La. Ann. 1043 (1892). This extract, by the way, is an excellent instance of the common confusing of the "burden of establishing" and the "burden of evidence." The first reference is apparently to the burden of establishing; the second to the burden of evidence. "Full and conclusive proof, however, where a party has the burden of proving a negative, is not required, but even vague proof, or such as renders the existence of the negative probable, is, in some cases, sufficient to change the burden to the other party." *Beardstown v. Virginia*, 76 Ill. 34 (1875); cited with approval in *Vigus v. O'Bannon*, 118 Ill. 334 (1886).

"Where the negative does not admit of direct proof, or the facts lie more immediately within the knowledge of the defendant," the party within whose knowledge the proof is, is required to produce evidence of the affirmative. *U. S. v. Hayward*, 2 Gall. 485, 498 (1815).

So in an action for a penalty in neglecting, *without* excuse from the judge of probate, to probate a will, it was held that the onus was on the plaintiff to establish the negative averment of lack of excuse. *Smith v. Moore*, 6 Greenl. 274 (1830).

Probably the onus of the party having the burden of establishing is relieved of the proof of these facts because of the presumption that suppressed evidence is unfavorable to the one who declines to produce it; a feeling embodied in the maxim, *omnia contra spolia-*

torem. Lovell *v.* Payne, 30 La. Ann., Pt I., 511 (1878); Great Western R. R. *v.* Bacon, 30 Ill. 347 (1863).

"Where it is as easy for the plaintiff to prove the negative as it is for the defendant to disprove it, then the burthen of proof must rest upon him, as that the place where the animal was killed was not in a town or village, or was not more than five miles from a settlement; but where the means of proving the negative are not within the power of the plaintiff, but all the proof on the subject is within the control of the defendant, who, if the negative is not true, can disprove it at once, there the law presumes the truth of the negative averment, from the fact that the defendant withholds or does not produce the proof, which is in his hands if it exists, that the negative is not true. In other words, the burthen of proof is thrown upon the defendant to prove the affirmative against the negative averment." Great Western R. R. *v.* Bacon, 30 Ill. 347 (1863).

FACTS WELL KNOWN TO OTHER PARTY. — The rule requiring proof of essential negative facts by him who has the burden of establishing is especially modified where such proof includes facts difficult of proof and peculiarly within the knowledge of the other party.

Thus where the defendant is charged with the commission of an act without a license or other authority of law, as the fact of such license or authority being one peculiarly within the knowledge of the defendant, he may be called upon to prove it. *State v. Morrison*, 3 Dev. 299 (1831); *Haskill v. Com.* 3 B. Mon. 342 (1843); *State v. Crowell*, 25 Me. 171 (1845); *Shearer v. State*, 7 Blackf. 99 (1844); *Schmidt v. State*, 14 Mo. 137 (1851); *Wheat v. State*, 6 Mo. 455 (1840).

On an indictment for selling intoxicating liquor, *not* being an agent appointed for the sale of the same, it is not incumbent upon the government to prove the negative averment; but if the necessary facts exist, the onus is on the defendant to introduce evidence to prove them. *State v. Shaw*, 35 N. H. 217 (1857). On an indictment for keeping a ferry without a license, the same rule is applied. *Wheat v. State*, 6 Mo. 455 (1840). So on an indictment against a physician for practising without a license. *Williams v. People*, 121 Ill. 84 (1887).

So in an action against a railroad company, under a statute, for killing stock, the burden of establishing is not on the plaintiff to prove the averment that there was *no* contract between the company and the owner of the land that the owner should fence. Great Western R. R. *v.* Bacon, 30 Ill. 347 (1863).

"When a fact is peculiarly within the knowledge of a party, the burden is on him to prove such fact whether the proposition be affirmative or negative." *Robinson v. Robinson*, 51 Ill. App. 317 (1893); *Clapp v. Ellington*, 87 Hun, 542 (1895).

Where the plaintiff is the party to whose case the existence of a

license is essential, he must prove it. For example, in a civil action for liquors sold. *Bliss v. Brainard*, 41 N. H. 256 (1860); *Solomon v. Dreschler*, 4 Minn. 278 (1860).

To the contrary effect, see *Wilson v. Melvin*, 13 Gray, 73 (1859). "There is no legal presumption that the sale is unlawful, and there should hardly be, in favor of a defendant who has himself joined in the contract. As against the Commonwealth, the legislature have required that the defendant in a criminal prosecution shall prove the authority under which he acts, when charged with a violation of the statutes prohibiting the unlicensed sale of intoxicating liquors; but they have imposed no such obligation upon parties who seek the enforcement of contracts." *Ibid.* So where the defendant sets up the illegality of such a contract, it is for him to establish it, even if so doing includes the proof of negative averments. *Craig v. Proctor*, 6 R. I. 547 (1860).

The same result is reached by statute in Massachusetts. Pub. Stats. Ch. 214, Sect. 12. Under this section it has been held, speaking of the licensee, "If he be invested with that authority only in case certain circumstances exist, it is for the party relying on the license to prove the existence of the circumstances." *Com. v. Towle*, 138 Mass. 490 (1885). Therefore, in case of a sale on Sunday, it is necessary to show that the persons sold to were guests of the licensee's hotel, such sales only being authorized by the license.

BURDEN OF ESTABLISHING IN CRIMINAL CASES. — The pleadings in a criminal case place the burden of establishing upon the government as to all the essential ingredients of the crime charged. *State v. Patterson*, 45 Vt. 308 (1873). *Shafer v. State*, 7 Tex. App. 239 (1879); *Com. v. McKie*, 1 Gray, 61 (1854): "The burden is on the Commonwealth to prove all that is necessary to constitute the crime of murder." *Com. v. Eddy*, 7 Gray, 583 (1856); *People v. Garbutt*, 17 Mich. 9 (1868).

So of insanity in a criminal case. As the court say on a trial for murder, "The prosecution takes upon itself the burden of establishing not only the killing, but also the malicious intent in every case. There is no such thing in the law as a separation of the ingredients of the offence, so as to leave a part to be established by the prosecution, while as to the rest the defendant takes upon himself the burden of proving a negative. The idea that the burden of proof shifts in these cases is unphilosophical, and at war with fundamental principles of criminal law." *People v. Garbutt*, 17 Mich. 9, 21 (1868); *State v. Crawford*, 11 Kans. 32 (1873); *Fife v. Com.*, 29 Pa. St. 429 (1857).

In a criminal case, where the defence of *alibi* was relied on, the court say that if they are to construe a ruling of the trial judge, that by evoking this defence, "the prisoner changed the burthen of proof under his plea of not guilty, and waived his right under that

plea, to demand from the Commonwealth full proof of his guilt, we should be bound to say that it was a cruel and monstrous misapprehension of the law. . . . But it is very clear that a resort to that kind of evidence neither changes the burthen of proof on the other questions in the cause, nor in any manner entitles the Commonwealth to a verdict against the prisoner without proof of his guilt beyond reasonable doubt." *Fife v. Com.* 29 Pa. St. 429 (1857).

In a Massachusetts case for arson where the defence of *alibi* was also relied upon, the court sustain a ruling which, indeed, is correct, though using the phrase "burden of proof" indiscriminately as designating the burden of introducing evidence to support the claim of *alibi* (which clearly rested on the defendant as soon as the government had made out a *prima facie* case), and the burden of establishing that the defendant was guilty (which at no time left the government). "The proposition was, in substance, that if the defendant sought to establish the fact that he was at a particular place at a particular time, the burden of proof was upon him. But he (the trial judge) modified this statement in respect to its bearing upon the burden of proof which was upon the government to establish the alleged fact that the defendant was present at the fire. The substance of the whole ruling was, that if the evidence of the defendant which tended to prove an *alibi* was such that, taken together with the other evidence, the jury were left in reasonable doubt as to whether the defendant was present at the alleged fire, they should acquit him. We cannot see that he has any ground to object to this ruling, for it left the evidence which tended to prove the *alibi*, even if it failed to establish it, to have its full effect in bringing into doubt the evidence tending to prove the defendant's presence at the fire." *Com. v. Choate*, 105 Mass. 451 (1870). To the same effect see *Briceland v. Com.*, 74 Pa. St. 463 (1873). "There is no shifting of the burden of proof. It remains upon the State throughout the trial. The evidence may shift from one side to the other. The state may establish such facts as must result in a conviction, unless the presumption they raise be met by evidence, but still the burden of proof is on the State to establish the guilt of the accused beyond a reasonable doubt." *State v. Wingo*, 66 Mo. 181 (1877).

To the contrary effect, that when the defendant in a criminal case relies on the justification of self-defence, he must prove the same by a fair preponderance of the evidence, see *People v. Schryver*, 42 N. Y. 1 (1870).

PROCEEDINGS WITHOUT PLEADINGS. — Where the legal investigation is of such a nature that there are no pleadings, the analogy of pleading is so far followed that the burden of establishing lies upon him who asserts the affirmative of the issue as determined by the nature of the investigation.

As the party offering a will for probate impliedly affirms that the will "was executed with the requisite formalities by one of full age and sound mind, he must prove it." The onus of establishing is therefore on him throughout. This burden is not shifted by evidence of sanity by the subscribing witnesses. *Crowninshield v. Crowninshield*, 2 Gray, 524 (1854); *Comstock v. Hadlyme Ecclesiastical Society*, 8 Conn. 254 (1830); *Ware v. Ware*, 8 Greenl. 42 (1831).

THE BURDEN OF ESTABLISHING DOES NOT SHIFT. — It is hardly necessary to say that this burden of establishing a case does not shift. It cannot shift, simply because the issue has been fixed once for all by the pleadings, and the rules of pleading do not permit it to be altered during the progress of a trial on those pleadings. *Wright v. Wright*, 139 Mass. 177 (1885). "We understand the doctrine to be well settled in this Commonwealth, that the burden of proof never shifts; and we think, that in the case we are discussing, and in the case at bar, the burden to show negligence was upon the plaintiffs from the beginning, and remained on them throughout the trial." *Willett v. Rich*, 142 Mass. 356 (1886); *Aulls v. Young*, 98 Mich. 231 (1893).

In this sense, it is true that "a *prima facie* case does not change the burden of proof." *Blanchard v. Young*, 11 Cush. 341, 345 (1853). In an action of contract on the warranty of the endorsement on a promissory note, the defendant set up that he was acting as a broker in the negotiation of the note, and that the plaintiff knew the fact. The plaintiff asked for a ruling that the burden of proof was on the defendant to satisfy the jury of these facts. Held: that such an instruction was rightly refused. "Although it was incumbent upon the defendant to establish the truth of any fact relied upon by him to overcome the *prima facie* case which the plaintiff had made out, yet there was no change in the burden of proof in a legal sense. This defence was not a confession and avoidance. It was indeed an assertion of new and distinct facts; but it tended to establish the negative of the very proposition upon which alone the plaintiff could recover; namely, that his contract was with the defendant in the suit." *Wilder v. Cowles*, 100 Mass. 487 (1868).

It is thought that a certain amount of ambiguity in the use of the phrase "burden of proof," lies in the fact that under the statute laws of many of the states of the American Union, there are no such things as pleadings, — in the scientific sense. The defendant is allowed to set up some kind of a general issue and introduce, under that traverse, a number of affirmative defences on which, in a more scientific system of pleading, the burden would be on him. For example, under a general issue to a declaration charging negligence, the defendant, it has been held, is entitled to give evidence of contributory negligence. *Indianapolis &c. R. R. v. Horst*, 93 U. S.

291 (1876). Under these circumstances, the burden of proof is said to be upon the defendant to establish the defence relied upon by a fair preponderance of the evidence. In other words, he has the burden of establishing that issue. As a matter of common-law pleading, the defence of contributory negligence is set up by an affirmative plea. *Stone v. Hunt*, 94 Mo. 475 (1887).

It may plausibly be said that in cases like *Indianapolis &c. R. R. v. Horst (ubi supra)*, the burden of establishing changes, or, as it is said, shifts. Color is given to this suggestion by the fact that while, on the record, the affirmative of the issue seems to be upon the plaintiff, after the affirmative defence of contributory negligence is set up, the burden of establishing it, by a fair preponderance of the evidence, is upon the defendant. This seeming exception to the rule that the burden of establishing does not change, exists in appearance only. The fact seems to be that the parties are not really at issue on the allegations of the record, and only become so when the defendant states his real defence in the evidence. In other words, the defendant is allowed to raise the issue by his evidence, instead of in his pleading. The real issue in *Indianapolis &c. R. R. v. Horst* was one of contributory negligence, and on this defence the affirmative was on the defendant. Under a scientific system of pleading, this issue would have been revealed before the close of the pleadings, and the burden of establishing definitely placed upon the defendant. Under the system of pleading in use in *Indianapolis &c. R. R. v. Horst (ubi supra)*, the defendant was accorded the privilege of delaying the time at which he should set up his real affirmative defence until the record pleadings had closed and the trial begun. Another instance may be found in *McCloskey v. Davis*, 8 Ind. App. 190 (1893), where the court say: "When a general denial is pleaded, all defences may be proved under the issues thus formed, except a set-off or counter claim."

(2) BURDEN OF EVIDENCE.—The duty of introducing evidence to prove or prevent proof of facts in issue is not, like the burden of establishing, a resultant of the pleadings. Its position, as between the parties, is determined, not by the state of the pleadings, but by the logical state of the case. The issue being fixed, the logical interest of one party is to produce an affirmative conviction on the part of the tribunal. It is the object of the other party to prevent it. Such a state of the evidence as would, if undisputed, produce such affirmative conviction, constitutes a *prima facie* case. It merely repeats the statement, therefore, in another form, to say that the interest of one party is to establish such a *prima facie* case, and of the other party to destroy it, either by establishing a *prima facie* case of his own, or by reducing the probative force of the opposing case below the required standard. Should this effort succeed, the necessary consequence is that the burden or necessity rests on the first

pleader to introduce additional evidence with a view to strengthening his former proof into a *prima facie* case, either by disproving the facts alleged against it, or by proving additional facts. If, when the evidence on both sides is all in, the pleader who has the affirmative of the issue remains with what the tribunal considers the equivalent of a *prima facie* case, he succeeds; otherwise, not. The necessity for having the final tip of the scale in his favor has not changed since the pleadings placed it on him, however many times the probative scales may have changed in their balance. "When upon all the facts the case is left in equipoise, the party affirming must fail." *Oaks v. Harrison*, 24 Ia. 179 (1868).

THE BURDEN OF EVIDENCE SHIFTS. — It follows from what has been said that this burden of introducing evidence to prove or disprove a *prima facie* case may, and frequently does, change from one side to the other. A fair test of where it rests at any particular stage of the case is to answer the question: Against whom would the tribunal decide if no further evidence were introduced? Applying this test, it is obvious that at the opening of the case the burden of establishing and the burden of evidence rest on the same person. *Vriets v. Hagge*, 8 Pa. 163, 192 (1859). Upon the establishment by him of a *prima facie* case, while the burden of establishing remains, the burden of evidence is obviously shifted. *Powers v. Russell*, 13 Pick. 69, 77 (1832); *Tolson v. Inland, &c. Coasting Co.*, 6 Mackey, 39 (1887); *Penitentiary Co. v. Gordon*, 85 Ga. 159 (1890); *Ketchum v. Amer. &c. Exp. Co.*, 52 Mo. 390 (1873). "The two burdens are distinct things. One may shift back and forth with the ebb and flow of the testimony. The other remains with the party upon whom it is cast by the pleadings,—that is to say, with the party who has the affirmative of the issue." *Scott v. Wood*, 81 Cal. 398 (1889).

"During the progress of a trial it often happens that a party gives evidence tending to establish his allegation, sufficient it may be to establish it *prima facie*, and it is sometimes said that the burden of proof is then shifted. All that is meant by this is, that there is a necessity of evidence to answer the *prima facie* case, or it will prevail, but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial." *Heinemann v. Heard*, 62 N. Y. 448, 455 (1875). The supreme court of Texas, after saying that the fact that the negative form of the issue does not determine the burden of proving, add, "Much less does the fact that a defendant is forced to maintain the affirmative of some fact, in disproving the plaintiff's case, shift upon him the burden of proof." *Clark v. Hills*, 67 Tex. 141 (1886); *Small v. Clewley*, 62 Me. 155 (1873); *Jones v. Simpson*, 116 U. S. 609 (1885); *Harris v. Harris*, 154 Pa. St. 501 (1893).

Where a deed *prima facie* correct was put in evidence by the plaintiffs in aid of their title, the burden of introducing evidence to show a forgery is on the defendant. "The appellees having made a *prima facie* case of the genuineness of the instrument the burden of proof was cast upon the intervenor to rebut this." *Smith v. Gillum*, 80 Tex. 120 (1891). In an action for negligently overdriving a horse the court say: "A *prima facie* case was made by the introduction of evidence tending to prove that the horse, at the time of the delivery to the defendant, was apparently in good condition. If the evidence had closed at this point, the plaintiff would have been entitled to recover, provided the jurors were satisfied from its evidence that the horse was in a healthy condition at the time of its delivery to defendant. Therefore, at this stage of the proceeding, the *burden of evidence* was cast on the defendant to show by some substantial evidence that he exercised ordinary care in the use of the animal. When this burden was met, then the final question for the jury was whether the whole evidence preponderated in favor of the plaintiff as to the constitutive facts of its cause of action, *i. e.*, that the defendant was negligent in the use of the horse, and that such negligence was the proximate cause of its death. The burden of proving these issues by a preponderance of evidence was imposed on the plaintiff by the pleadings, and we can conceive of no principle, recognized in our code of civil procedure, that would relieve the plaintiff of this onus." *Marshall Livery Co. v. McKelvy*, 55 Mo. App. 240 (1893).

"In every case in which there is *prima facie* evidence of any right existing in any person, the burden of proof is always on the person or party calling such right in question." *Walker v. Detroit, &c. R. R.*, 47 Mich. 338, 351 (1882).

So where a plaintiff claims an easement by prescription, the onus of proving the easement claimed is on him. When the necessary facts are shown, the *prima facie* case is established. If the defendant's position be that he was under a disability at the time of the user claimed to be adverse, the onus of introducing evidence to prove such disability is on the defendant. *Davidson v. Nicholson*, 59 Ind. 411 (1877).

So far as proof of particular facts goes, it is undoubtedly true that the party whose case requires proof of any particular fact is under the onus of introducing evidence to prove it. *Lehman Bros. v. McQueen*, 65 Ala. 570 (1880); *Clements v. Moore*, 6 Wall, 299, 315 (1867); *Frech v. Philadelphia, &c. R. R.*, 39 Md. 574 (1873).

If such particular fact, however, is involved in the proof of the affirmative of the issue in the case, it is sufficient for the party not having the burden of establishing, to create an equipoise or reasonable doubt, according as the case may be civil or criminal.

As an instance of the ambiguity arising from the use of the term,

"burden of proof," to indicate the burden of introducing evidence to prove particular facts, see *Burton v. Blin*, 23 Vt. 151 (1851), where the learned judge (Chief Justice Redfield) says: "As a general rule, it is fair to say, that the burden of proof rests upon both parties, to make out their own part of the case."

PRESUMPTIONS OF LAW. — It is said that "presumptions of law shift the burden of proof." This is not true of the burden of establishing. It may be quite correct as to the burden of evidence, if the presumption in question covers a fact in evidence. As to such fact, there is a *levamen probationis* in favor of the party having the onus. A presumption of law is a fact to be proved, rather than evidence to prove a fact.

As has been said, the burden of evidence is, at first, on the party who has the burden of establishing, and afterwards on the party who has to meet an amount of adverse evidence equivalent to a *prima facie* case. A presumption of law as to fact covered by it establishes a *prima facie* case. That is its precise object and effect. It follows that the party who is able to prove the existence of a presumption of law in his favor has, in so doing, made out a *prima facie* case as to the fact covered. The burden of disproving it is cast on the opposing interest. In other words, the burden of evidence is shifted. When conflicting evidence on the point covered by the presumption of law is gone into on the initiative of the opposing interest, the presumption of law is *functus officio*, as such. The presumption of fact on which it is founded loses its *prima facie* value as a *levamen probationis*, but retains any probative force.

So in an action on a promissory note, where the defence is lack of consideration, the court charged that the burden of proof was on the defendant to prove such lack of consideration. Held, that this was erroneous. "In one sense, a burden of proof would be upon the defendant a particular burden, to rebut the *prima facie* case made by the production of a genuine note, but the general burden of proof was upon the plaintiff to show a consideration for the notes, and that burden does not shift. . . . Here the plaintiff declares, in his writ, that the notes were given for value. If not so given, they were not the contracts upon which the defendant could be legally held. The plaintiff is required to prove this essential allegation. He can rely on the presumption which arises from the note itself. But there being other evidence on both sides, which has a bearing upon the question of consideration, the burden remains upon the plaintiff upon all the evidence produced, including the note itself and the presumption that arises from it, to establish what he, in the declaration in his writ, has necessarily alleged." *Small v. Clewley*, 62 Me. 155 (1873; *Atlas Bank v. Doyle*, 9 R. I. 76 (1868); *Manistee Bank v. Seymour*, 64 Mich. 59 (1887); *Wilcox v. Henderson*, 64 Ala. 535 (1879); *Coffin v. Grand Rapids, &c. Co.* 136 N. Y. 655

(1893); *Kitner v. Whitlock*, 88 Ill. 513 (1878); *Temple Street Cable R. R. v. Hellman*, 103 Cal. 634 (1894).

A fair instance of the effect of a presumption of law in shifting the burden of evidence may be seen in the defence of insanity in criminal causes. According to the better opinion the burden is on the government to prove sanity — beyond a reasonable doubt. *State v. Jones*, 50 N. H. 369, 400 (1871); *People v. Garbutt*, 17 Mich. 9 (1868); *State v. Crawford*, 11 Kans. 32 (1873); *Com. v. Eddy*, 7 Gray, 583 (1856).

At the opening of the trial the burden of proving the defendant guilty rests on the government. The burden of introducing evidence of the facts necessary to sustain that burden of proving, in other words the establishment of a *prima facie* case, is also on the government.

But to make out such a *prima facie* case, so far as sanity is concerned, the government is not required to produce affirmative evidence as part of its original case. It is a presumption of law that all men are sane.

If the accused rests his defence on the claim that he is insane, and there is no other evidence in the case, the burden of evidence is on him to introduce evidence to that effect. If he is silent, the presumption of law prevails. It thus has shifted the burden of evidence from the government to the accused. But the burden of establishing the defendant guilty has not shifted. If the accused weakens the government's *prima facie* case by raising a reasonable doubt as to his sanity, the burden of introducing evidence to strengthen the government's quantum of proof to the equivalent of a *prima facie* case now rests on the government, — who may introduce affirmative evidence of sanity. In so doing, while the *prima facie* effect of the presumption of law as a *levamen probationis* is gone, the government is entitled to the full probative effect of the presumption of fact that the accused is sane, because men generally are.

When all the evidence is in on the issue of sanity, the burden of establishing still continuing to rest on the government, if the accused has succeeded in preventing the government from establishing the equivalent of a *prima facie* case, by raising a reasonable doubt as to his sanity, he must be acquitted. *State v. Jones*, 50 N. H. 369, 400 (1871); *People v. Garbutt*, 17 Mich. 9 (1868); *State v. Crawford*, 11 Kans. 32 (1873).

Presumptions of law may be established by the legislature prescribing that certain facts shall establish a *prima facie* case.

Like other presumptions of law, the presumptions so created do not operate to alter the burden of establishing, but transfer to the opposite party the onus of introducing evidence to meet the *prima facie* case they establish. While the party having the burden of

establishing is excused from going forward in the first instance when there is a presumption of law in his favor, he is by no means thereby excused from the necessity of establishing that fact if disputed. *Com. v. Heath*, 11 Gray, 303 (1858).

Thus, when an auditor's report is made *prima facie* evidence by statute for the party in whose favor it is. "The auditor's report, it is true, is only *prima facie* evidence, and does not change the burden of proof, but the plaintiff may in the first instance rest his case upon it, and, if it is attempted to control or impeach it by other evidence offered by the defendants, may be permitted to put in evidence in reply, in support of his own case." *Brewer v. Housatonic R. R. Co.*, 104 Mass. 593 (1870); *Shepardson v. Perkins*, 60 N. H. 76 (1880); *Blodgett v. Cummings*, 60 N. H. 115 (1880). So of the assessment of value by appraisers appointed under a statute. *Railroad v. Crider*, 91 Tenn. 489 (1892).

Such *prima facie* effect may be given to certain evidence, by statute, not only in civil but in criminal cases.

Thus the law may provide that the act of a physician in prescribing whiskey is *prima facie* a violation of the "local option" law. *Com. v. Minor*, 88 Ky. 422 (1889).

RIGHT TO OPEN AND CLOSE. — This right is rather a rule of practice and procedure than one involved in the burden of proof. As a rule, however, the party having the burden of establishing has the right to open and close. *Seavy v. Dearborn*, 19 N. H. 351 (1849); *Royal Ins. Co. v. Schwing*, 87 Ky. 410 (1888); *Ware v. Ware*, 8 Greenleaf, 42 (1831); *Gaul v. Fleming*, 10 Ind. 253 (1858); *Norris v. Ins. Co.*, 3 Yeates, 84 (1800). But while this is so, the right is largely discretionary with the court, and on a probate of a will where the party not under the burden of establishing was given the open and close, the court refused a new trial. *Comstock v. Hadlyme Ecclesiastical Society*, 8 Conn. 254 (1830).

In Massachusetts, on the contrary, the plaintiff opens and closes, regardless of who has the burden of establishing a case under the pleadings. *Page v. Osgood*, 2 Gray, 260 (1854); *Hurley v. O'Sullivan*, 137 Mass. 86 (1884). The rule is the same in equity cases. *Dorr v. Tremont Bank*, 128 Mass. 349 (1880).

In probate trials, in Massachusetts, the executor propounding the will opens and closes without regard to the burden of proof. *Dorr v. Tremont (ubi supra)*; *Crowninshield v. Crowninshield*, 2 Gray, 524 (1854). The rule is essentially one of procedure. For a short period the right to open and close could be acquired by the defendant under a rule of court. *Spaulding v. Hood*, 8 Cush. 602 (1851); *Emmons v. Hayward*, 11 Cush. 48 (1853).

CHAPTER IV.

BEST EVIDENCE.

§ 391.¹ THE fourth of the rules which have been laid down² as governing the production of evidence is, that *the best evidence, of which the case in its nature is susceptible*, should always be presented to the jury. This rule does not demand that the greatest amount of evidence which can possibly be given of any fact should be offered; it is designed to prevent the introduction of such evidence as, from the nature of the case, allows room for supposing that better evidence is in the possession of the party, and to prevent fraud. For when better evidence than that which is offered is withheld, it is only fair to presume, that the party has some sinister motive for not producing it, which would be frustrated if it were offered.³ The rule is thus essential to the pure administration of justice. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence is attainable.⁴ For instance, depositions are in general admissible only after proof that the parties who made them cannot themselves be produced;⁵ and a preliminary agreement, which has been followed up by the execution of a deed of conveyance, cannot be admitted as evidence to show what parcels were subsequently conveyed.⁶ For the contents of every deed must be proved by the production of the deed itself, if such deed be within the control of

¹ Gr. Ev. § 82, in part.

² Ante, § 217.

³ See *Strother v. Barr*, 1828 (Best, C.J.); *Brewster v. Sewell*, 1820 (Holroyd, J.); *Twyman v. Knowles*, 1853 (Jervis, C.J.); *Clifton v. U. S.*, 1846 (Am.) (Nelson, J.).

⁴ 1 Phil. Ev. 418; 1 St. Ev. 500; Glassf. Ev. 266—278; *Tayloe v. Riggs*, 1828 (Am.); *U. S. v. Reyburn*, 1832 (Am.); *Minor v. Tillotson*, 1833 (Am.).

⁵ B. N. P. 239.

⁶ *Williams v. Morgan*, 1850.

the party. For every deed is the best evidence of its own contents, and its non-production raises a presumption that it contains some matter of defeasance. On the same principle, if there be duplicate originals of a deed, all must be accounted for, before secondary evidence can be given of any one.¹

§ 392. Similarly, an instrument, *requiring attestation* to its validity,² must in general be proved by calling a subscribing witness;³ and if there be two such witnesses, it will not be sufficient so long as one of them is alive, sane, free from permanent sickness, within the jurisdiction of the court, and capable of being found by diligent inquiry, to prove the signature of the other who is dead; for such evidence would merely *raise a presumption* that the deceased had witnessed all which the law requires for the due execution of the instrument; whereas the surviving witness would have been able to *give direct proof*. Such direct testimony is evidence of a better and higher nature than mere presumption arising from the proof of the witness's handwriting.⁴

§ 393. The rule under discussion only excludes evidence which *itself indicates the existence of more original sources* of information. Therefore, when there is no substitution of inferior evidence, but only a selection of weaker, instead of stronger, proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed.⁵ For instance, in proof or disproof of handwriting, or in proof of the contents of a letter which cannot be produced, it is not necessary to call the supposed writer; ⁶ where it is necessary to prove negatively that an act was done without the consent, or against the will, of another, the person whose will or consent is denied, need not be himself called,⁷ and where an instrument is required to be attested by two witnesses, it is only necessary,—excepting in the case of wills relating to real estate,—to call one of them, though the other may be at hand.⁸ Even the

¹ *Alivon v. Furnival*, 1834 (Parke, B.).

² As to proving execution of documents *not* requiring attestation, see 28 & 29 V. c. 18, § 7.

³ *Bowman v. Hodgson*, 1867.

⁴ *Wright v. Doe d. Tatham*, 1834 (Tindal, C.J.).

⁵ 1 Ph. Ev. 418. See *Alfonso v.*

U. S., 1843 (Am.).

⁶ *R. v. Hurley*, 1843; *Hughes' case*, 1802; *M'Guire's case*, 1801; *R. v. Benson*, 1810; *Liebman v. Pooley*, 1816; *Bank Prosecutions*, 1819.

⁷ *R. v. Hazy*, 1826; *R. v. Allen*, 1826; *R. v. Hurley*, 1843.

⁸ *Andrew v. Motley*, 1862; *Belbin v. Skeats*, 1857; *Forster v. Forster*,

previous deposition of a deceased subscribing witness, if admissible on other grounds, may supersede the necessity of calling the survivor.¹

§ 394.² The rule that in each case *the best attainable evidence* is required to be given naturally suggests that *all evidence* is divided into PRIMARY and SECONDARY. *Primary evidence* is the best or highest evidence, or, in other words, that kind of proof which, in the eye of the law, affords the greatest certainty of the fact in question. Until it is shown that the production of this evidence is out of the party's power, no other proof of the fact is in general admitted. All evidence falling short of this in its degree, and suggesting on the face of it that other and better evidence is attainable, is termed *secondary*. The question whether evidence is primary or secondary has reference to the nature of the case in the abstract, and not to the peculiar circumstances under which the party, in the particular cause on trial, may be placed. It is a distinction of law, and not of fact; referring only to the *quality*, and not to the *strength* of the proof. Evidence, which carries on its face no indication that better remains behind, is not secondary, but primary.

§ 395.³ But though all information must, if possible, be traced to its fountain head, yet if there be several distinct sources of information of the same fact, it is not in general necessary to show that they have all been exhausted, before recourse can be had to secondary evidence with respect to one of them.⁴ For instance, if it be requisite to prove that a collector has received certain sums of money, primary evidence of that fact is the evidence of the collector himself if he be alive, or else the evidence of the parties who paid him, while (if the collector be dead) secondary evidence—such as entries in his book acknowledging the receipt, or if the book itself be in the hands of the opposite party, who, after notice, refuses to produce it, even secondary evidence of its contents—is also admissible.⁵

1863; *Anstey v. Dowsing*, 1745, 1746; Gr. Ev. 120, 122, 123.

¹ *Wright v. Doe d. Tatham*, 1834.

² Gr. Ev. § 84, in part.

³ Gr. Ev. § 84, as to first four lines.

⁴ *Cutbush v. Gilbert*, 1818 (Am.);

U. S. v. *Gibert*, 1834 (Am.).

⁵ *Middleton v. Melton*, 1829 (Bayley and Parke, JJ.); *Barry v. Bebbington*, 1792. The distinction between this case and that of the two subscribing witnesses to an instru-

§ 396.¹ The cases which most frequently call for the application of the rule that the best evidence of which the case is susceptible must always be produced, are those which relate to the *substitution of oral for written evidence*. The effect of the rule on these cases is to render it necessary that the *contents of a written instrument, which is capable of being produced, be proved by the instrument itself, and not by parol evidence*.² Lord³ Tenterden said: "I have always acted most strictly on the rule, that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments; they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule."⁴ Lord Wynford observed: "I seldom pass a day in a Nisi Prius Court without wishing that there had been some written statement evidentiary of the matters in dispute. More actions have arisen, perhaps, from want of attention and observation at the time of a transaction, from the imperfection of human memory, and from witnesses being too ignorant, and too much under the influence of prejudice, to give a true account of it, than from any other cause. There is often a great difficulty in getting at the truth by means of parol testimony. Our ancestors were wise in making it a rule, that in all cases the best evidence that could be had should be produced; and great writers on the law of evidence say, if the best evidence be kept back, it raises a suspicion that, if produced, it would falsify the secondary evidence on which the party has rested his case. The first case these writers refer to as being governed by this rule is, that where there is a contract in writing, no parol testimony can be received of its contents, unless the instrument be proved to have been lost."⁵ An additional but important reason for the application of the rule

ment, where, as we have seen (ante, § 392) proof must be given that both the witnesses are unable to be called, before evidence of the handwriting of one of them can be received,—seems to be, that the attesting witnesses are either rendered necessary by statute, or at least have been solemnly chosen by the parties, as the persons on whose united testi-

mony they wish to rely, and, consequently, so long as one of them can be called, secondary evidence respecting the other cannot be admitted.

¹ Gr. Ev. § 85, as to first three lines.

² The Queen's case, 1820, H. L.

³ Gr. Ev. § 88, in part.

⁴ Vincent v. Cole, 1828.

⁵ Strother v. Barr, 1828.

in the manner pointed out is, that the court may acquire a knowledge of the whole contents of the instrument, which may have a very different effect from the statement of a part.¹

§ 397. The rule requiring every written document to be proved by production of the document itself in civil courts² often indirectly inflicts grave injustice³ in consequence of the stamp laws. For, as a general rule, a document which is inadmissible for want of a stamp³ to prove the fact it *prima facie* shows is also inadmissible for any purpose whatever,⁴ even a collateral purpose—so that, for example, an insufficiently stamped promissory note cannot be used as evidence of the receipt of money by the maker of such note.⁵ An exception to this rule indeed prevails when it is only sought to use a document to refresh the memory.⁶ And, moreover, the judges, some years ago, promulgated a rule (which is, perhaps, of questionable expediency), that, unless the want or insufficiency of a stamp be pointed out at the earliest possible period, that is, as soon as the document is tendered in evidence, an objection on that ground will not be entertained.⁷ And a further attempt has been made to, as the Common Law Commissioners express it,⁸ “reconcile the claims of justice with the interests of the revenue,” by enabling all such instruments as may be stamped after execution to be received in evidence, though unstamped, or insufficiently stamped, if the party who tenders them is prepared at the trial to pay to the officer of the court the proper duty,⁹ the penalty, and a further sum of 1*l*.¹⁰

¹ The Queen's case, 1820, H. L.

² In criminal courts a stamp objection does not apply at all. “The Stamp Act, 1891” (54 & 55 V. c. 39), § 14, subs. 4.

³ See per *Ld. Tenterden*, in *Reid v. Batte*, 1829. The law as to stamps is now contained for the most part in “The Stamp Act, 1891” (54 & 55 V. c. 39).

⁴ *Interleaf Publishing Co. v. Phillips*, 1885.

⁵ *Ashling v. Boon*, 1891.

⁶ See post, § 1411.

⁷ *Robinson v. Ld. Vernon*, 1859. See ante, § 309.

⁸ 2nd Rep. p. 26.

⁹ A document to be “duly stamped” must be stamped “in accordance with the law in force at the time when it was first executed.” 54 & 55 V.

c. 39, § 14, subs. 4; *Clarke v. Roche*, 1877.

¹⁰ 54 & 55 V. c. 39 (“The Stamp Act, 1891”), § 14, subss. 1 and 2, enacts, that “upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon; and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same as aforesaid, and of a further

Further, it is provided that instruments executed abroad may be stamped within thirty days of their being received in the United Kingdom.¹ And this provision applies to a charterparty *wholly executed abroad*.² By R. S. C., 1883, Ord. XXXIX., r. 8, it is also provided that "a new trial shall not be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp." This provision impliedly restrains a judge at Nisi Prius from reserving for the court any question respecting the sufficiency of a stamp on a document admitted by him at the trial,³ and makes the ruling of the judge final where a case is tried by him without a jury.⁴ In the criminal courts, no objection can now be taken to the admissibility of any document in evidence for want of a sufficient stamp.

§ 398. The cases under the rule requiring the contents of a document to be proved by the document itself, if its production be possible,⁵ may be arranged in three classes: the *first* class containing those instruments which the law requires to be in writing; the *second*, those contracts which the parties have put in writing; and the *third*, all other writings material to the issue, the existence or contents of which are disputed.⁷

§ 399.⁸ The *first* class of cases in which oral evidence cannot be substituted for the writing are those in which there exists any *instrument which the law requires to be in writing*. The law having required that the evidence of the transaction should be in writing, no other proof can be substituted for that so long as the

sum of one pound, be received in evidence, saving all just exceptions on other grounds. The officer or arbitrator or referee receiving the duty and penalty shall give a receipt for the same, and make an entry in a book kept for that purpose of the payment and of the amount thereof, and shall communicate to the commissioners the name or title of the proceeding in which, and of the party from whom, he received the said duty and penalty, and the date and description of the instrument, and shall pay over to such person as the commissioners may appoint, the money received by him for the said duty and penalty."

¹ See now 54 & 55 V. c. 39 ("The Stamp Act, 1891"), § 15, subs. (3).

² The Belfort, 1884.

³ Siordet v. Kuczinski, 1855; Tattersall v. Fearnley, 1856; Cory v. Davis, 1863.

⁴ Blewitt v. Tritton, 1892 (C. A.).

⁵ 54 & 55 V. c. 39 ("The Stamp Act, 1891"), § 14, subs. (4).

⁶ Gr. Ev. § 85, in part.

⁷ The question how far witnesses may be cross-examined as to written statements made by them without producing the writings, will be discussed hereafter. See post, §§ 1446, et seq.

⁸ Gr. Ev. § 86, as to first six lines.

writing exists, and is in the power of the party. Accordingly, parol evidence is inadmissible to prove records, public and judicial documents, official informations¹ or examinations, deeds of conveyance of lands, wills, other than nuncupative, acknowledgments under Lord Tenterden's Act, promises to pay the debt of another person, and other writings mentioned in the Statute of Frauds; or to show at what sittings or assizes a trial at *Nisi Prius* came on,² or even that it took place at all, the only proper evidence of this being the record, or at least the record with a minute of the verdict indorsed on it,³ nor to prove the date of a party's apprehension for a particular offence, as the warrant for apprehension or committal is superior evidence;⁴ as it also is to prove the testimony of a witness when it is required by law that it should be reduced into writing,—as, for instance, when it is taken by depositions, either before an Examiner of the Court, or before a magistrate on an indictable charge,—since the writing is in all subsequent proceedings, whether civil or criminal, the best evidence of what the witness has stated;⁵ and so it also is as to the statement of a prisoner before the magistrate upon an examination reduced into writing, and subscribed, and returned by the justice,⁶ in conformity with the Indictable Offences Act, 1848,⁷ in England, or the corresponding Act in Ireland.

§ 400. Parol evidence of what was said by a prisoner before a magistrate is however admissible if the written examination be excluded for informality,⁸—other than for having been a confession taken on oath, and therefore not voluntary,⁹—or if it be clearly

¹ *R. v. Dillon*, 1877.

² *Thomas v. Ansley*, 1807 (Ld. Ellenborough); *R. v. Page*, 1807 (Ld. Kenyon); as explained in *Whitaker v. Wisbey*, 1852, cited ante, § 85.

³ *Olive v. Gwin*, 1658; *R. v. Browne*, 1829.

⁴ *R. v. Phillips*, 1818.

⁵ *Leach v. Simpson*, 1839, post, § 416. But in *R. v. Coll*, 1889 (Ir.), the judge at the trial, having rejected a deposition which he ought to have received, appears to have afterwards set the matter right by the reception of oral evidence from a witness of what he said he had also sworn on

the same day, and the majority of the Irish Court of Criminal Appeal sanctioned his action. The refinement by which it was supported was that for all that appeared the witness was speaking of a separate sworn information which had not been reduced into writing.

⁶ *R. v. Fearshire*, 1779; *R. v. Jacobs*, 1784. See post, § 893 et seq.

⁷ 11 & 12 V. c. 42; 14 & 15 V. c. 93, Ir.

⁸ *R. v. Reed*, 1829 (Tindal, C.J.); *R. v. Christopher*, 1849, post, § 416.

⁹ *R. v. Wheeley*, 1838 (Alderson, B.); *R. v. Rivers*, 1835 (Park, J.).

proved¹ that the statement was not reduced into writing. So it may also, if the prisoner was examined on two occasions, or with reference to two offences, and the examination, signed by the magistrates, relates only to what occurred on one occasion,² or with respect to one offence,³ as to statements made by the prisoner in that part of the inquiry not included in the written examination. In like manner, if a witness, having given a written deposition in a cause, has afterwards testified orally in court, parol evidence may, in the event of his death, be given of his *vivâ voce* testimony, notwithstanding the existence of the deposition;⁴ for, in this last case, as two independent sources of information exist, the party who relies on the evidence may, at his discretion, have recourse to either. In all these cases the parol evidence is offered, not in substitution for that of the official document, since no such document exists, but as the best evidence which the circumstances admit of.

§ 401.⁵ The *second* class of cases⁶ falling within the rule requiring the contents of a document to be proved by the document itself if its production be possible consists of those in which *the parties have of themselves chosen to put their contract into writing*. Here also oral proof cannot be substituted for the *written evidence*. The written instrument may indeed be regarded, in some measure, as the ultimate fact to be proved, especially in the case of negotiable securities; and has tacitly been treated by the parties themselves as the only repository and the appropriate evidence of their agreement. The written contract is not collateral, but is of the very essence of the transaction;⁷ and consequently, in all proceedings,

¹ But in *Parsons v. Brown*, 1852, Jervis, C.J., held that the Court could not, in the absence of positive evidence, let in parol evidence by *presuming* that examinations before justices on a charge of felony were not taken down in writing; but see *R. v. Coll (Ir.)*, cited ante, § 399, n. ^o.

² *R. v. Wilkinson*, 1838 (Parke, B., and Littledale, J.); *R. v. Christopher*, 1849. See also *R. v. Coll (Ir.)*, supra.

³ *R. v. Harris*, 1832.

⁴ *Tod v. E. of Winchelsea*, 1828 (Ld. Tenterden).

⁵ *Gr. Ev.* § 87, in part.

⁶ See supra, § 398.

⁷ See *R. v. Castle Morton*, 1820 (Abbott, C.J.). Domat thus explains the principles on which a document is deemed part of the essence of any transaction, and consequently the best or primary proof of it:—"The force of written proof consists in this: men agree to preserve by writing the remembrance of past events, of which they wish to create a memorial, either with a view of laying down a rule for their own guidance, or in order to have, in the instrument, a lasting proof of the

civil or criminal, in which the issue depends in any degree upon the terms of a contract, the party whose witnesses show that it was reduced to writing, must either produce the instrument, or give some good reason for not doing so. Thus, for example, if in an action to recover land against a tenant holding over, or in an action for the use and occupation of real estate, it should appear, either on the direct or cross-examination of the plaintiff's witnesses, that a written contract of tenancy has been signed, plaintiff must either produce it, or account for its absence;¹ and in an action by landlord against tenant for rent and non-repair, if it should appear that the parties had agreed by parol that the tenant should hold the premises on the terms contained in a former lease between the landlord and a stranger, a nonsuit would be directed, unless this lease could be produced.²

§ 402. The same strictness prevails where the question at issue is simply what amount of rent was reserved by the landlord,³ or who was the actual party to whom a demise had been made,⁴ or under whom the tenant came into possession.⁵ It has also several times been held that, in an action for *extra* work done beyond the contract, if it appeared that the work was commenced under an agreement in writing, in the absence of positive proof that the work in question was entirely separate from that included in the agreement, and was in fact done under a distinct order, the plaintiff is bound to produce the original document, since it may

truth of what is written. Thus contracts are written, in order to preserve the memorial of what the contracting parties have prescribed for each other to do, and to make for themselves a fixed and immutable law, as to what has been agreed on. So, testaments are written, in order to preserve the remembrance of what the party, who has a right to dispose of his property, has ordained concerning it, and thereby to lay down a rule for the guidance of his heir and legatees. On the same principle are reduced into writing all sentences, judgments, edicts, ordinances and other matters, which either confer title, or have the force of law. The writing preserves unchanged the matters intrusted to it, and expresses the intention of the

parties by their own testimony. The truth of written acts is established by the acts themselves, that is, by the inspection of the originals": Domat's Civ. Law, Liv. 3, tit. 6, § 2.

¹ *Brewer v. Palmer*, 1800 (Ld. Eldon); *Fenn v. Griffith*, 1830; *Henry v. M. of Westmeath*, 1843 (Ir.) (Richards, B.); *Thunder v. Warren*, 1845 (Ir.); *Rudge v. McCarthy*, 1841 (Ir.).

² *Turner v. Power*, 1828.

³ *R. v. Merthyr Tidvil*, 1830; *Augustien v. Challis*, 1847, where Alderson, B., observes, "you may prove by parol the relation of landlord and tenant, but without the lease you cannot tell whether any rent was due."

⁴ *R. v. Rawden*, 1828.

⁵ *Doe v. Harvey*, 1832.

furnish evidence, not only that the items sought to be recovered were not included therein, but also of the rate of remuneration upon which the parties had agreed.¹ On like principles, where an auctioneer delivered to a bidder, to whom lands were let by auction, a written paper *signed by himself*, containing the terms of the lease, in an action for use and occupation, the landlord was held bound to produce this paper duly stamped as a memorandum of an agreement.²

§ 403. Similarly, where³ the plaintiff had been employed as secretary to the committee of a charitable society, pursuant to a resolution entered in the book of the committee, of which, having accepted the situation and entered upon its duties, the plaintiff during his service had the care, and on the society being afterwards dissolved sued some of the members of the committee of the society for his salary, it was held that he was bound to produce the book under which he was engaged. It is doubtful whether, in an action for an injury done to the plaintiff's reversion, his interest as reversioner may be proved by the parol testimony of the tenant, when it appears that the premises are occupied under a written agreement.⁴

§ 404. On principle, in cases of this kind, the fact that the writing is in the possession of the adverse party does not change its character; it is still the primary evidence of the contract; and its absence must be accounted for by notice to the other party to produce it, or in some other legal mode, before secondary evidence of its contents can be received. But in all such cases, if the plaintiff can establish a *primâ facie* case, without betraying the existence of a written contract relating to the subject-matter of the action, he will not be precluded from recovering by the defendant subsequently giving evidence that the agreement was reduced

¹ *Vincent v. Cole*, 1828 (Ld. Tenterden); *Buxton v. Cornish*, 1844; *Jones v. Howell*, 1835; *Holbard v. Stephens*, 1841 (Williams, J.); *Parton v. Cole*, 1842 (Patteson, J.). See *Reid v. Batte*, 1829, cited post, § 405; and *Edie v. Kingsford*, 1854.

² *Ramsbottom v. Mortley*, 1814. See *Ramsbottom v. Tunbridge*, 1814, cited post, § 406. See, also, *Hawkins*

v. Warre, 1825, where Abbott, C.J., draws the distinction between papers signed by the parties or their agents, and those which are unsigned.

³ *Whitford v. Tutin*, 1834.

⁴ *Cotterill v. Hobby*, 1825, holding that the agreement must be produced (which seems correct), and in *Strother v. Barr*, 1828, where the judges were equally divided.

into writing; but the defendant, if he means to rely on a written contract, must produce it as part of his evidence,¹ and in the event of its turning out to be unstamped, or insufficiently stamped, he must pay the duty and penalty²—and this even though a notice to produce the document has been served on the plaintiff.³ It has even been held in an action of ejectment that the plaintiff cannot be forced to produce a written agreement merely because one of his witnesses proved, on cross-examination, that an agreement, which he only knew *related in some way to the land in question*, was seen on that morning in the hands of the plaintiff's solicitor, and was produced at a former trial between the same parties, since, to exclude parol evidence of the tenancy, it should appear (which it did not) that the agreement was between the same parties, and was binding at the time of the second trial.⁴

§ 405.⁵ Moreover, a written communication or agreement between the parties which is *collateral* to the question in issue, need not be produced. For example, plaintiff can recover without producing the original written agreement, if during an employment under a written contract a verbal order is given for separate work, if he can show distinctly that the items, for which he seeks remuneration, were not included therein; as, for instance, that whilst certain work was in progress in the *inside* of a house under a written agreement, a verbal order was given to execute some alterations or improvements on the *outside*.⁶ So, also, *the fact* of the existence of a particular relationship may be shown by parol evidence, though the terms which govern such relationship appear to be in writing.⁷ Thus, if the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent parol evidence, such as payment of rent, or the testimony of a witness, who has seen the tenant occupy, notwithstanding it appears that the occupancy was

¹ *Magnay v. Knight*, 1840; *Stephens v. Pinney*, 1818; *Marston v. Dean*, 1835; *Fry v. Chapman*, 1836; *R. v. Padstow*, 1832; *Reed v. Deere*, 1827.

² *Ante*, § 397.

³ See cases cited in n. ¹, *supra*.

⁴ *Doe v. Morris*, 1810.

⁵ *Gr. Ev.* § 89, in part.

⁶ *Reid v. Batte*, 1829 (*Ld. Tenterden*); commented on by *Patteson, J.*, in *Parton v. Cole*, 1842. See *Vincent v. Cole*, 1828, and cases cited *ante*, § 402, n. ¹.

⁷ See dictum of *Alderson, B.*, and other cases cited in next note.

under an agreement in writing;¹ where a tenant holds lands under written rules, but the length of his term has been agreed orally, these rules need not be produced in an action of trespass where the defendant denies the tenant's possession, because it is only necessary to prove the extent of the tenant's term, which, having been agreed to by parol, does not depend upon the written rules;² the fact of partnership may be proved by parol evidence of the acts of the parties, without producing the deed;³ and the fact that a party has agreed to sell goods on commission may be established by oral testimony, though the terms respecting the payment of the commission have been reduced into writing.⁴

§ 406. Parol evidence will be admissible when the writing only amounted either to mere unaccepted proposals, or to minutes capable of conveying no definite information to the court or jury, and could not, by any sensible rule of interpretation, be construed as memoranda, which the parties themselves intended to operate as fit evidence of their several agreements. Thus, it has been admitted where, at the time of letting premises to the defendant, the plaintiff had read the terms from pencil minutes, and the defendant had acquiesced in these terms, but had not signed the minutes;⁵ where, upon a like occasion, a memorandum of agreement had been drawn up by the landlord's bailiff, the terms of which were read over, and assented to, by the tenant, who agreed to bring a surety and sign the agreement on a future day, but omitted to do so;⁶ where, in order to avoid mistakes, the terms upon which a house was let were, at the time of letting, reduced to writing by the lessor's agent, and in his absence signed by the lessee's wife, in order to bind him, and the lessee himself afterwards entered upon and occupied the premises but did not otherwise appear to have constituted the wife

¹ *R. v. Holy Trinity*, Hull, 1827; *Doe v. Harvey*, 1832; *Spiers v. Willison*, 1808 (Am.); *Dennett v. Crocker*, 1832 (Am.) See, however, the observations of Best, C.J., on *R. v. Holy Trinity*, in *Strother v. Barr*, 1828; see, also, *Twynam v. Knowles*, 1853; *Augustien v. Challis*, 1847 (Alderson, B.), cited ante, § 402.

² *Hey v. Moorhouse*, 1839.

³ *Alderson v. Clay*, 1816 (Ld. Ellenborough).

⁴ *Whitfield v. Brand*, 1847.

⁵ *Trewhitt v. Lambert*, 1839. See *Drant v. Brown*, 1825; and *Bethell v. Blencowe*, 1841, where it was held that written proposals, made pending a negotiation for a tenancy, might be admitted without a stamp, as proving one step in the evidence of the contract.

⁶ *Doe v. Cartwright*, 1820. See *Hawkins v. Warre*, 1825.

as his agent, or to have recognized her act;¹ where lands were let by auction, and a written paper was delivered to the bidder by the auctioneer, containing the terms of the letting, but was never signed either by the auctioneer or by the parties;² and where, on the occasion of hiring a servant, the master and servant went to the chief constable's clerk, who in their presence, and by their direction, took down in writing the terms of the hiring, but neither party signed the paper, nor did it appear to have been read to them.³

§ 407. Where, too, an action is not directly upon an agreement and for non-performance of its terms, but is in tort, for the conversion, or detention, or negligent loss of the writing containing such agreement, plaintiff may give parol evidence, descriptive of its identity, without giving notice to the defendant to produce the document itself.⁴ Moreover, even though the defendant be willing to produce such document without notice, the plaintiff is not bound to put it in, but may leave his adversary to do so, if he think fit, as part of his own case.⁵ For, as has been observed, for the purpose of identification, no distinction can be drawn between written instruments and other articles; between trover for a promissory note, and trover for a waggon and horses.⁶

§ 408. A similar rule prevails in criminal cases. For example, if a person be indicted for stealing a bill or other written instrument, its identity may be proved by parol evidence, though no notice to produce it has been served on the prisoner or his agent.⁷ On an indictment for forgery, however, if the forged instrument be in the hands of the prisoner, the prosecutor must serve him or his solicitor with a notice to produce it, before he can offer secondary evidence of its contents.⁸

¹ *R. v. St. Martin's*, Leicester, 1834.

² *Ramsbottom v. Tunbridge*, 1814. See *Ramsbottom v. Mortley*, 1814, cited ante, § 402.

³ *R. v. Wrangle*, 1835. See, for other instances, *Ingram v. Lea*, 1810; *Dalison v. Stark*, 1803; *Wilson v. Bowie*, 1823.

⁴ *Scott v. Jones*, 1813; *How v. Hall*, 1811; *Bucher v. Jarratt*, 1802; *Read v. Gamble*, 1839; *Ross v. Bruce*, 1803 (Am.); *The People v. Holbrook*,

1816 (Am.); *M'Lean v. Hertzog*, 1820 (Am.). These cases overrule *Cowan v. Abrahams*, 1793.

⁵ *Whitehead v. Scott*, 1830 (Ld. Tenterden).

⁶ *Jolley v. Taylor*, 1807 (Sir J. Mansfield).

⁷ *R. v. Aickles*, 1784.

⁸ *R. v. Haworth*, 1830 (Parke, J.); *R. v. Fitzsimons*, 1869 (Ir.). Several grounds for this difference between larceny and forgery may be suggested. One is, that under the old law (see

§ 409.¹ The *third* class of cases² falling within the rule that a written document can only be proved by the instrument itself, embraces *every writing* not falling within the two classes already discussed, as to *the existence or contents of which there is a dispute*, and which is *material to the issue* between the parties, and which is not a mere memorandum of some other fact. Thus, to take some common examples, newspapers and account-books are the best evidence of their own contents, and therefore a witness cannot be asked whether certain resolutions were published in the newspapers;³ neither can he be questioned as to the contents of his account-books.⁴ The primary proof of the publication of an opera is the production of the printed music, and consequently the fact of publication cannot be proved in the first instance by a witness who has merely seen the opera in print, or heard parts of it played in society.⁵ The fact of a person being rated to the relief of the poor can only be legally proved by the rate-book itself,⁶ or at least a certified or examined copy from it,⁷ and it therefore cannot be shown by the collector stating that such person's name was on the rate;⁷ neither can a plaintiff be asked on cross-examination whether his name is written in a certain book described by the questioner, unless a satisfactory reason be first given for the non-production of the book

now 24 & 25 V. c. 98 ("The Forgery Act, 1861"), § 42, cited ante, § 291), it was always sufficient, on charges of larceny, to both in the indictment and the proof describe a *stolen* instrument in very general terms, whereas, in the case of *forgery*, the prosecutor was often required to enter into a minute description of the document alleged to have been forged (*Butcher v. Jarratt*, 1802 (Chambre, J.)). A second is, that a person charged with stealing an instrument must know, from the very nature of the accusation, that he will be called upon to produce it, while an indictment for forgery furnishes no such intimation; and it will be presently seen, when the rules which regulate the serving of notices to produce are discussed (post, § 452), that this is a material distinction. A third (and very substantial) one is that, where the charge is one of

larceny, it is highly improbable that anything material will turn either upon the contents of, or a minute description of, the instrument itself, whereas on a charge of forgery the exact opposite is the case, and an examination of the instrument itself may very probably prove of the highest importance.

¹ Gr. Ev. § 88, in part.

² See supra, § 398.

³ *R. v. O'Connell*, 1843-4 (Ir.).

⁴ See post, § 462.

⁵ *Boosey v. Davidson*, 1849. But see *Geralopulo v. Wieler*, 1851 (Jervis, C.J.).

⁶ *R. v. Coppull*, 1801, recognised (*Patteson, J.*) in *R. v. Staple Fitzpaine* (1842). See "The Poor Rate Assessment and Collection Act, 1869," 32 & 33 V. c. 41, § 18, cited ante, § 147A.

⁷ *Justice v. Elstob*, 1858.

itself.¹ Having regard to these principles, it is very doubtful whether the contents of handbills written or dictated at a meeting of conspirators can be proved by oral testimony.²

§ 410—11. When it is stated that oral testimony cannot be substituted for any writing included in either of the three classes above mentioned, a tacit *exception* must, perhaps, be made in favour of the *parol admissions* of a party, and of his *acts amounting to admissions*. A party's *admissions*, and *acts amounting to admissions*, are primary proof against himself and those claiming under him, even where they relate to the contents of a deed or other instrument, which are directly in issue in the cause.³ It is said that the reason why such statements or acts are admissible, without notice to produce, or accounting for the absence of the written instrument, is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas, what a party himself admits to be true, may reasonably be presumed to be so.⁴

¹ *Darby v. Ouseley*, 1856.

² *R. v. Thistlewood*, 1820. See post, § 417.

³ *Earle v. Picken*, 1833 (Parke, B.); *Newhall v. Holt*, 1840 (id.); *Slatterie v. Pooley*, 1840; *Bethell v. Blencowe*, 1841; *Howard v. Smith*, 1841; *R. v. Welch*, 1846; *King v. Cole*, 1848; *R. v. Basingstoke*, 1851; *Boulter v. Peplow*, 1850. These cases overrule Lord Tenterden's decision in *Bloxam v. Elsie*, 1825. See *Fox v. Waters*, 1814.

⁴ *Slatterie v. Pooley*, 1840 (Parke, B.). Although the admission of a party may fairly be presumed to be true, the parol evidence by which that admission is proved need by no means be so; and, indeed, such testimony is open to even greater objection than applies to the ordinary case, where secondary evidence is produced, and the best evidence is withheld. When the admission is made in Court, it may very reasonably be allowed to render needless the production of the written instru-

ment to which it refers, because the simple question in such case will be, is the admission true? and the rational presumption is, that a man will not tell a falsehood, which is against his own interest. But when a witness is called to say that he has heard the opposite party make a certain statement with respect to the contents of a written instrument, the further question arises, was this statement really made? and to permit such parol evidence to be equally admissible, in proof of the contents of the instrument, with the production of the instrument itself, is to open a vast field for misapprehension, perjury, and fraud, which would be wholly closed, if the salutary rule of law, requiring that what is in writing should be proved by the writing itself, were here, as in other cases, to prevail. Lord Tenterden and Mr. Justice Maule have emphatically expressed opinions in support of the view here suggested (see *Bloxam v. Elsie*, 1825; *Boulter v. Peplow*,

§ 412. Since some observations in the last footnote dealing with the above reasons were written, the judges in Ireland¹ have declared their disapproval of the principles which such reasons embody. "The doctrine that parol admissions can prove the contents of written documents is," said Pennefather, C. J., "a most dangerous proposition; by it a man might be deprived of an estate of 10,000*l.* per annum derived from his ancestors through regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear that they heard the defendant say he had conveyed away his interest therein by deed, or had mortgaged, or had otherwise encumbered it; and thus, by the facility so given, the widest door would be opened to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty."

§ 413. In any case it is doubtful whether (even assuming it to be established) the doctrine allowing admissions by parol to sufficiently prove a written document extends to records, as well as to deeds and ordinary writings, and whether it would embrace the case of a *confessio juris*, as well as that of a *confessio facti*. On the one hand, the admission of a party that he had been discharged under the Insolvent Debtors Act, was held insufficient evidence of a valid discharge, because the judicial document, on being produced, might be found irregular and void, and the party might be

1850); while Parke, B., himself has declared that the parol evidence of admissions may, in some cases, be quite unsatisfactory to a jury (*Slat-terie v. Pooley*, 1840), and that too great weight ought never to be attached to such evidence, since it frequently happens that the witness not only has misunderstood what the party has said, but, by unintentionally altering a few of the expressions really used, has given to the statement an effect completely at variance with what was intended. See note to *Earle v. Picken*, 1833. Moreover, as the reporter observes in the report of *Boulton v. Peplow* (1850), 9 C. B. 501, n. c, "according to *Slat-terie v. Pooley*, what A. states as to what B., a party, has said respecting the contents of a document which B. has seen, is admissible,

whilst what A. states, respecting a document which he himself has seen, is not admissible,—although in the latter case, the chance of error is single, in the former, double."

¹ *Lawless v. Queale*, 1845 (Ir.). The case which called forth the remarks cited above was an action for use and occupation. At the trial, one of the plaintiff's witnesses, after proving the occupation of the premises by the defendant, acknowledged in cross-examination the existence of a written agreement; and the Court held, that this agreement must be produced, though the defendant had admitted that he was tenant at a particular rent. See, also, *Ld. Gosford v. Robb*, 1845; *Parsons v. Purcell*, 1849; and *Hen-man v. Lester*, 1862 (Byles, J.).

mistaken.¹ On the other hand, on an indictment for bigamy, the prisoner's deliberate declaration, that he had been married in a foreign country was held to render it unnecessary to prove that the marriage had been celebrated according to the laws of that country ;² and in an action for wages, an admission by plaintiff that his claim had been referred to an arbitrator, who had made an award against him, was held admissible evidence on behalf of the defendant.³

§ 414. A material difference, at all events, exists between proving by an admission the execution of an instrument requiring attestation, which is produced, and proving the party's admission, that by such and such instrument, which is not produced, a certain act was done. It will hereafter be shown,⁴ that when an instrument, which requires attestation to give it validity,⁵ is in court, and its execution is to be proved against a hostile party, an admission on his part of due execution, unless made with a view to the trial of that cause, is generally⁶ not sufficient.

§ 415.⁷ Where a writing does not fall within either of the three classes already described, no reason exists why it should exclude oral evidence. For instance, if a written communication be *accompanied* by a verbal one to the same effect, the latter may be received as independent evidence, though not to prove the contents of the writing, nor as a substitute for it ;⁸ the payment of money may be proved by oral testimony, though a receipt be taken ;⁹ a verbal demand of goods may be shown, though a demand in writing was made at the same time ;¹⁰ the admission of a debt is provable by oral testimony, though a written promise to pay was simultaneously given ;¹¹ and the determination of an interest in land, whether freehold or copyhold, may be proved without producing, or accounting for the non-production of, the title-deeds or court rolls, but merely

¹ *Scott v. Clare*, 1812 (Ld. Ellenborough). See, also, *Summersett v. Adamson*, 1822 ; *Jenner v. Jolliffe*, 1810 (Am.) ; *Welland Canal Co. v. Hathaway*, 1832 (Am.).

² *R. v. Newton*, 1843 (*Wightman and Cresswell, JJ.*). But see *R. v. Flaherty*, 1847 ; and *R. v. Savage*, 1876 (*Lush, J.*).

³ *Murray v. Gregory*, 1850.

⁴ See post, §§ 1843, 1849.

⁵ See 28 & 29 V. c. 18, § 7.

⁶ See, however, *Nagle v. Shea*, 1875.

⁷ Gr. Ev. § 90, in part.

⁸ See ante, § 400.

⁹ *Rambert v. Cohen*, 1803 ; *Jacob v. Lindsay*, 1801.

¹⁰ *Smith v. Young*, 1808 (Ld. Ellenborough).

¹¹ *Singleton v. Barrett*, 1832.

showing that a deceased occupier had, while in possession, declared that his interest in the premises would expire at his death,¹ since,—as will presently be seen,²—all statements by a person, while in possession of property, are, after his death, in themselves primary evidence, if they tend to cut down his interest therein.³

§ 416. In the same way, oral evidence of what then passed will be equally as admissible as the clerk's note, where, on a preliminary hearing of a charge, the magistrate's clerk takes down what the witness says, but neither the witness nor the magistrate signs the writing, and it does not constitute part of the depositions returned:⁴ or if, on the hearing of an information for a trespass in pursuit of game,⁵ the clerk takes a note of the charge; because this is not one of those cases where the magistrate is bound to take down what the witnesses say;⁶ or if in support of an indictment for perjury committed in a County Court, without production of the judge's note, the perjury be proved by any witness who was then present, if the case was one in which the law does not require the judge to take any note.⁷ Similarly, too, what passed at a meeting where the proceedings of directors, commissioners, public trustees, and the like, are voluntarily entered in books, may be proved by parol, because the fact that such books are rendered by statute admissible in evidence, does not exclude verbal proof of what has taken place.⁸ On like grounds, it is not necessary to produce a certificate of registration in order to prove that a joint stock company has been completely registered.⁹ The fact of birth, baptism, marriage,¹⁰ death or burial, may, for the same reason, be proved by parol testimony, for though the law requires a narrative or memorandum of these events to be entered in registers, the existence or contents of these registers form no part of the fact to

¹ *Doe v. Langfield*, 1847.

² *Post*, § 684 et seq.

³ *Doe v. Langfield*, 1847 (Parke, B.).

⁴ *Jeans v. Wheedon*, 1843 (Cresswell, J.); *R. v. Christopher*, 1849; ante, § 400.

⁵ Under 1 & 2 W. 4, c. 32 ("The Game Act, 1831"), § 30.

⁶ *Robinson v. Vaughton*, 1838 (Alderson, B.).

⁷ *R. v. Morgan*, 1852 (Martin, B.); *Harmer v. Bean*, 1853 (Parke, B.).

⁸ *Miles v. Bough*, 1842; *Inglis v. Gt. North. Ry. Co.*, 1852, H. L.

⁹ *Agricultural Cattle Ins. Co. v. Fitzgerald*, 1851, decided under the repealed Act, 7 & 8 V. c. 110, §§ 7, 25. See, now, 25 & 26 V. c. 89, § 18. See, also, *R. v. Langton*, 1876.

¹⁰ *Lady Limerick v. Lord Limerick*, 1862.

be proved, and the entry is no more than a collateral or subsequent memorial of that fact, which may be used to furnish a satisfactory and convenient mode of proof, but cannot exclude other evidence,¹ while the non-production of a minute book or register at most does no more than afford grounds for scrutinising such evidence with more than usual care. The *fact* that a picture is an infringement of the copyright in another picture may, too, be proved in an action for infringement of copyright without producing the original picture.² It is also every-day practice for the fact that writing is very like that of a named person to be proved without producing any of that person's writing.

§ 417.³ The principle under consideration, though hitherto only illustrated by examples drawn from *civil* cases, also applies in *criminal* ones. Accordingly, on prosecutions for political offences, such as treason, conspiracy, and sedition, the *inscriptions* on flags and banners paraded in public, and the contents of *resolutions* read at a public meeting, may be proved, as being of the nature of speeches, by oral testimony.⁴ Where, too, a party was indicted for administering an unlawful oath, a witness was permitted to give parol evidence of the words used, though he stated his belief that the accused read the words from a paper, which he held in his hand when he administered the oath, and no notice to produce this paper had been served on the prisoner.⁵

§ 418. The rule of law that *the best evidence* which the nature of each case permits must always be produced, has thus far been discussed as to its effect in forbidding *oral* evidence being substituted for written evidence. But the same rule of law sometimes excludes *writings which the law considers as entitled to less weight* than those which might be forthcoming. The original of a document must always (with a few exceptions that will be presently mentioned⁶) be produced, and a mere *copy*, however

¹ *Evans v. Morgan*, 1832; *R. v. Allison*, 1806; *Harrison v. Corp. of Southampton*, 1853; *R. v. Mainwaring*, 1856; *Reed v. Passer*, 1794; *St. Devereux v. Much Dew Church*, 1761-2; *Morris v. Miller*, 1766-7; *Birt v. Barlow*, 1779; *Com. v. Norcross*, 1813 (Am.); *Ellis v. Ellis*, 1814 (Am.); *Owings v. Wyant*, 1795 (Am.).

² *Lucas v. Williams*, 1892, C. A.

³ Gr. Ev. § 90, in part.

⁴ *R. v. Hunt*, 1820; *Sheridan's and Kirwan's case*, 1811; *R. v. O'Connell*, 1843-4 (Ir.). See ante, § 409, and cases cited in notes.

⁵ *R. v. Moors*, 1801.

⁶ Post, § 428.

accurate, will not be, in the first instance, admissible.¹ For instance, on an indictment for feloniously setting fire to a house, with intent to defraud the insurers, the policy itself, being the best evidence of the fact of insurance, must be produced by the prosecutor; and recourse cannot be had either to parol evidence that the premises were insured, or to the books of the insurance office, unless notice to produce the policy itself has been duly served upon the defendant, as this ought to be, and usually is, in his possession.² If, too, it be necessary to show the contents of a manuscript which is in the possession of the opposite party, a paper, purporting to be a printed copy, cannot be received in evidence, without a notice to produce the manuscript.³ The question as to what is or is not an original is sometimes raised. On this point it is settled that, on the one hand, a duplicate writing, taken from an autograph at one impression by means of a copying machine cannot be regarded as an original, but the autograph itself must be produced, or its non-production be accounted for as in ordinary cases.⁴ On the other hand, all printed copies struck off in one common impression, though they constitute merely secondary evidence of the contents of the paper from which they are taken, are primary evidence of each other's contents.⁵

§ 419. The memorial of a registered conveyance is primary evidence⁶ to prove the contents of a deed against the party by whom the deed is registered, and those who claim under him, being considered in the light of an admission,⁷ and is at the very least, as against such persons, good secondary⁸ evidence. As against third persons, however, it is certainly inadmissible as primary evidence.⁹

¹ B. N. P. 293, 294.

² *R. v. Doran*, 1791 (Ld. Kenyon); *R. v. Kitson*, 1832; *R. v. Gilson*, 1807; *R. v. Ellicombe*, 1833 (Littledale, J.).

³ *R. v. Watson*, 1817.

⁴ *Nodin v. Murray*, 1812 (Ld. Ellenborough). In India, "an impression of a document made by a copying machine shall be taken without further proof to be a correct copy." Act 11 of 1855, § 35.

⁵ *R. v. Watson*, 1817, where the question was, whether a prisoner was acquainted with the contents of certain placards, some copies of

which were traced to his possession, and a copy remaining with the printer was allowed to be read in evidence for the prosecution, though no notice had been served upon the prisoner to produce the copies which had been delivered to him.

⁶ *Boulter v. Peplow*, 1850 (Maule, J.). See *Brown v. Armstrong*, 1873 (Ir.).

⁷ *Wollaston v. Hakewill*, 1841.

⁸ *Doe v. Clifford*, 1847 (Alderson, B.); *D. of Devonshire v. Neill*, 1876-7 (Ir.).

⁹ *Molton v. Harris*, 1797 (Ld. Kenyon).

On one or two occasions, indeed, such memorial, or even an examined copy of the registry, has, under special circumstances, been received as secondary evidence of the contents of an indenture, not only as against parties to the deed, who have had no part in registering it, but also as against third persons.¹ The enrolment of a lease granted by the Crown is primary evidence, because the possessions of the Crown cannot be alienated but by matter of record; and so also are memorials of leases granted by the Duke of Cornwall, on account of the identity of interest which subsists between his Royal Highness and the Crown.²

§ 420. Occasionally it is a question of some nicety to determine what instrument constitutes the primary evidence of a transaction. For instance, it has been discussed what is the primary evidence of the transaction where goods have been sold through the medium of a broker. Some have said that the *broker's book*, if signed by the broker, is the primary evidence of the transaction, and consequently, in the first instance, the only admissible proof of the contract.³ On the other hand, it has, after much consideration, and after consulting merchants, been held that the *bought and sold notes*, provided they agree, and are signed so as to satisfy the Statute of Frauds,⁴ constitute the contract, and, as such, must be produced in the first instance.⁵ It is at least quite clear, that if no notes have been transmitted to the principals, recourse may be had to the signed entry in the book kept by the broker,⁶ or, indeed, to any other memorandum made by him as agent for both parties, which

¹ See *Sadler v. Biggs*, 1853, H. L.; *Biggs v. Sadler*, 1847 (Ir.); *Peyton v. M'Dermott*, 1837 (Ir.). See, also, *Collins v. Maule*, 1838; *Doe v. Kilner*, 1826. In all these cases, however, either the parties had been acting for a long period in obedience to the provisions of the supposed instrument, or the deed has been recited or referred to in other documents admissible in the cause.

² *Rowe v. Brenton*, 1828. For other instances, see post, §§ 1650 et seq.

³ *Sievwright v. Archibald*, 1851 (*Patteson, J.*, and *Ld. Campbell*); *Heyman v. Neale*, 1809 (*Ld. Ellen-*

borough); *Grant v. Fletcher*, 1826; *Henderson v. Barnewall*, 1827.

⁴ *Durrell v. Evans*, 1861. See *Par-ton v. Crofts*, 1864; and *Thompson v. Gardiner*, 1876. In these last two cases the production of the sold note only was held sufficient to satisfy the statute.

⁵ *Goom v. Aflalo*, 1826; *Thornton v. Kempster*, 1814; *Thornton v. Meux*, 1827 (*Abbott, C.J.*); *Cumming v. Roebuck*, 1816; *Hawes v. Forster*, 1834 (*Ld. Denman*); *Townend v. Drakeford*, 1843 (*id.*).

⁶ *Townend v. Drakeford*, 1843; *Pitts v. Beckett*, 1845 (*Parke, B.*); *Thompson v. Gardiner*, 1876.

is sufficient to satisfy the statute.¹ But if even a single note, actually *signed* by one party, has been delivered to the other party, this note has been held to itself constitute the contract, even though it differed materially from the note which was sent to the party signing that originally produced by the plaintiff.^{1a} Where the bought and sold notes are signed by the broker, and it is affirmatively shown that these substantially differ from each other, no binding contract is usually effected, even although the purchaser, on objection raised by the vendor to a particular word inserted in the sold note, strikes out that word, and evidences his consent to the erasure by affixing his initials thereto.²

§ 421. Whether the broker's book may be resorted to if there be a material disagreement between the bought and sold notes is a very difficult question. Two eminent judges, on three different occasions, held that it could not.³ But a third, who was no mean lawyer, thought that it could,⁴ and it is submitted that his opinion will ultimately prevail.

§ 422. In general, it will be sufficient if a party seeking to enforce a contract made through a broker produces the note in his possession, and shows that the broker was employed in the transaction by his adversary without producing the original broker's book. His adversary, if he rely on any variance between the bought and sold notes, must produce, as his evidence, the one that has been handed to himself.⁵

§ 423. As already indicated,⁶ any substantial variance between the bought note and the sold note may prevent there ever having been any contract at all. But the amount of variance that will have this effect cannot be expressly defined. In one case, where

¹ *Richey v. Garvey*, 1847 (Ir.). There the memorandum had been drawn up two or three days after the sale; but the Court held this fact to be immaterial, the broker's authority as agent for the parties not having been revoked.

^{1a} *Rowe v. Osborne*, 1815.

² *Cowie v. Remfry*, 1846, P. C. But see *Rowe v. Osborne*, 1815 (Ld. Ellenborough), recognized in *Cowie v. Remfry*, P. C., *supra*; and see,

also, *Moore v. Campbell*, 1854; *Heyworth v. Knight*, 1864 (Willes, J.).

³ *Thornton v. Charles*, 1836 (Ld. Abinger); *Townend v. Drakeford*, 1843 (Ld. Denman); and *Gregson v. Ruck*, 1843 (Ld. Denman).

⁴ Lord Wensleydale in *Thornton v. Charles*, 1836.

⁵ *Hawes v. Forster*, 1834 (Ld. Denman).

⁶ *Cowie v. Remfry*, 1846, P. C., *supra*, § 420.

the bought note spoke of a brokerage of one per cent., and a deposit of fifteen per cent., and the sold note stated that the brokerage was ten shillings per cent., and omitted all mention of the deposit, it was ruled that the discrepancy was fatal, though with respect to the brokerage one of the jury interpreted the notes as meaning that the broker should be paid by the buyer one per cent., and by the seller a half per cent.;¹ and a similar conclusion was come to in another case, where Scotch iron was named in the bought note, and Dunlop's iron, which is Scotch iron, but not the only kind of Scotch iron, was specified in the sold note;² and in yet a third, in which the sole difference between the bought and the sold notes was, that the one purported to deal with "Riga," and the other with "Petersburg," hemp.³ But a mere clerical error, or even a mistake in a name, if productive of no loss, will not invalidate the sale.⁴

§ 424. In applying the general rule that the original document, and not a mere copy of it, must be produced as evidence, to notarial instruments, it is always considered a duplicate made out at any time from the original or protocol in the notarial book, is equivalent to an original drawn up at the time of the entry in the book.⁵

§ 425. Primary proof of the title of a person as executor or administrator may, as to grants since the 11th of January, 1858,⁶ be proved either by producing the probate or letters, or by an exemplification thereof granted by a registrar or district registrar of the Probate Division of the High Court.⁷

§ 426. The rule as to whether any or which of the copies of deeds executed in duplicate may be regarded as an original, and as to any or which of them are to be regarded as copies, is this:—
When two or more parts are sealed and delivered by each party,—

¹ *Townend v. Drakeford*, 1843 (Ld. Denman). See *Kempson v. Boyle*, 1865, where parol evidence was admitted to explain away an apparent variance between the notes.

² *Sievewright v. Archibald*, 1851.

³ *Thornton v. Kempster*, 1814.

⁴ *Mitchell v. Lapage*, 1816. See *Bold v. Rayner*, 1836.

⁵ *Geralopulo v. Wieler*, 1851 (Maule, J.).

⁶ When the Act of 20 & 21 V. c. 77

("The Court of Probate Act, 1857") (as now amended by "The Statute Law Revision Act, 1892," 55 & 56 V. c. 19), came into operation. See *Gazette of Friday, Dec. 4, 1857*.

⁷ See forms of exemplifications appended to the Rules, &c. of 1862, for the Registrars of the Court of Probate in respect of non-contentious business, Nos. 10 and 11; and similar forms appended to Rules, &c. for the District Registrars, Nos. 11 and 12.

a practice which of late years has frequently prevailed,—they are denominated *duplicate* or *triplicate originals*,¹ and each copy is considered primary evidence.² When, however, each part is executed by one party only (as often occurs in the case of leases), the two instruments are called *counterparts*, and each is alternately the best evidence as against the party sealing it, and those in privity with such party,³ and secondary evidence of the contents of the other part.⁴ Thus, if a landlord brings an action for rent, he produces the counterpart executed by the tenant as original evidence,⁵ or, in the event of its loss, he may have recourse, either to the part sealed by himself, or to any other species of secondary proof of such counterpart:⁶ if, however, the tenant is the person aggrieved, he must rely on the part delivered by the landlord, and that executed by himself will only be considered as secondary evidence. For stamp purposes the counterpart sealed by the lessor is usually deemed the original; but that which is sealed by the lessee may be described in pleading as the “indenture,” though stamped as a counterpart, provided the action be brought against the lessee.⁷ Where any discrepancy is found to exist between a lease and its counterpart, the law will presume that the lease is correct, unless it be clear that the mistake is in that instrument.⁸

§ 427. On one or two occasions, where it was necessary to show that the plaintiff’s ancestor had exercised acts of ownership over the property in question, counterparts of leases older than the period of living memory, and found in the ancestor’s muniment room, have

¹ Note by reporter, 2 M. & Gr. 518 b, 1841.

² See *Colling v. Treweek*, 1827 (Bayley, J.); *Brown v. Woodman*, 1834 (Parke, J.).

³ *Roe v. Davis*, 1806; *May. of Carlisle v. Blamire*, 1807; *Paul v. Meek*, 1828; *Pearce v. Morrice*, 1832; *Burleigh v. Stibbs*, 1793; *Houghton v. Koenig*, 1856.

⁴ *Munn v. Godbold*, 1825. As secondary evidence it will be admissible, though unstamped: *id.* See 54 & 55 V. c. 39 (“The Stamp Act, 1891”), § 72; and *ante*, § 148.

⁵ The law in Ireland is now regulated by § 23 of the Act 23 & 24 V. c. 154, which enacts, that “in all

actions, suits, and proceedings, proof by or on behalf of any landlord of the perfection of the counterpart of any lease shall be equivalent to proof of the perfection of the original lease; and in case it shall appear that no counterpart existed, or that the counterpart has been lost, destroyed, or mislaid, proof of a copy of the original lease or counterpart, as the case may be, shall be sufficient evidence of the contents of the lease, as against the lessee, or any person claiming from or under him.”

⁶ *Doe v. Ross*, 1840; *Hall v. Ball*, 1841.

⁷ *Pearce v. Morrice*, 1832.

⁸ *Burchell v. Clark*, 1876.

been admitted in evidence even against strangers, though executed by no one but the persons named as lessees, who were not shown to have actually held under them, and though no excuse was given for not producing the original leases sealed by the ancestor.¹ It is difficult to reconcile these decisions with strict principle, since the counterparts amounted, in fact, to no more than admissions by third parties that the ancestor was seised; but the rule was apparently relaxed in consequence of the acknowledged difficulty of tracing acts of ownership after the lapse of many years.

§ 428. The rule which requires the production of the best attainable evidence has now been discussed, and an attempt has been made to illustrate the distinction between primary and secondary modes of proof. It remains, before concluding this chapter, to be seen upon what occasions *secondary evidence* will be received.

§ 428A. The first general rule is, that *secondary evidence is inadmissible, until it is shown that the production of primary evidence is out of the party's power*. The second is, that *secondary evidence as to previous oral testimony can only be given in a prescribed way and subject to certain restrictions*. The remaining general rule as to secondary evidence is that *there are no degrees of secondary evidence*.

§ 428B. The first of these general rules, namely, the rule that *secondary evidence is inadmissible until it be shown that the production of primary evidence is out of the party's power*, and the exceptions to it, will be most conveniently discussed with regard to, first, documentary evidence, and, next, to oral testimony.

§ 428C. With respect to documents, proof of their contents may be established by secondary evidence, first, when the original writing is destroyed or lost; secondly, when its production is physically impossible, or at least highly inconvenient; thirdly, when the document is in the possession of the adverse party, who refuses, after notice, or in some cases without notice, to produce it; fourthly, when it is in the hands of a third party, who is not com-

¹ Doe v. Pulman, 1842; D. of Bedford v. Lopes, 1838, decided by Ld. Denman; Bristow v. Cormican, 1878 (Ld. Blackburn), in H. L.; Gov. of Magdalen Hospital v. Knott, 1877, C. A.; Clarkson

v. Woodhouse, 1782. In this last case the distinction between counterparts and leases does not appear to have been much discussed, if taken at all.

pellable by law to produce it, and who, being called as a witness with a subpoena duces tecum, relies upon his right to withhold it; fifthly, when the law raises a strong presumption in favour of the existence of the document: sixthly, when the papers are voluminous, and it is only necessary to prove their general results; and lastly, when the question arises upon the examination of a witness on the *voire dire*.

§ 429.¹ First, if an *instrument be destroyed or lost*, a party who seeks to give secondary evidence of its contents must, to begin with, give some evidence that the original once existed,² and then either prove positively, or at least presumptively (as by showing that it has been thrown aside as useless³), that such instrument has been destroyed, or he must show that it has been lost by proof that a search has been unsuccessfully made for it, in the place or places where it was most likely to be found. What *degree of diligence* is necessary in a *search* for a lost instrument cannot easily be defined, as each case must depend much on its own peculiar circumstances.⁴ The party seeking to be allowed to give secondary evidence, on the ground that an instrument is lost, is, however, generally expected to show that he has, in good faith, exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.⁵ The object of the proof is merely to establish a reasonable presumption of the loss of the instrument, and this is a preliminary inquiry addressed to the discretion of the judge.⁶ The party offering secondary evidence, therefore, need not on ordinary occasions have made a search for the original document, as for stolen goods, nor be in a position to negative every possibility of its having been kept back.⁷ If the document be important, and such as the owner may have an interest in keeping, or if any reason exist for suspecting that it has been fraudulently withheld, a very

¹ Gr. Ev. § 558, in part.

² Doe v. Wittcomb, 1851 (Ld. Campbell); in H. L., 1853 (Alderson, B.).

³ R. v. Johnson, 1805.

⁴ Brewster v. Sewell, 1820 (Best, J.); Gully v. Bp. of Exeter, 1827. See Pardoe v. Price, 1844; R. v.

Gordon, 1855.

⁵ R. v. Saffron Hill, 1852. See Moriarty v. Grey, 1860 (Ir.).

⁶ Ante, § 23.

⁷ M'Gahey v. Alston, 1836 (Alderson, B.); recognized (Wigram, V.-C.) in Hart v. Hart, 1841.

strict examination will be required; but only a comparatively slight degree of diligence will be demanded on a search for a paper supposed to be of little or no value.¹

§ 430. When a document belongs to the personal custody of a particular individual, or is proved, or may be presumed, to be in his possession, he must in general be served with a subpoena duces tecum, and be sworn to account for it;² since, so long as he is capable of being called as a witness, his declarations respecting it will in strictness be inadmissible,³ and even after his death this species of evidence, though admissible as tending to prove the diligence and extent of the search, must be received with great caution.⁴ However, this species of evidence being only required for the purpose of satisfying the conscience of the judge on a preliminary inquiry, a looser rule is allowed to prevail than would have been applicable to proof of material issues; indeed it even has

¹ *Gathercole v. Miall*, 1846 (Pollock, C.B., and Alderson, B.); *Brewster v. Sewell*, 1820; *Kensington v. Inglis*, 1807; *R. v. East Fairley*, 1825 (Bayley, J.); *Freeman v. Arkell*, 1824.

² See *R. v. Saffron Hill*, 1852.

³ *R. v. Denio*, 1827; *R. v. Castleton*, 1795; *Williams v. Young-husband*, 1815; *Walker v. Lady Beauchamp*, 1834 (Alderson, B.).

⁴ *R. v. Rawden*, 1834 (Ld. Denman). On one occasion, where an apprentice, shortly before his death, had stated that his indenture had been given up to him after the expiration of the apprenticeship, and that he had burnt it, secondary evidence of its contents was received without any search having been made for it, as proof was given that the deed had not been executed in duplicate, that the master was dead, and that his executrix had declared that she knew nothing about the instrument (*R. v. Morton*, 1815). This decision appears to have proceeded on the somewhat dubious ground, that if the statement of the apprentice was inadmissible, the indenture was not traced into his hands, and as the term of service had expired, no particular reason could be assigned

why it should be in his custody, while, if the statement was receivable to show a possession of the deed by him, it further showed that search for it was unnecessary (per Ld. Ellenborough, in 4 M. & Sel. 50, 1815; explained by Bayley, J., in *R. v. Denio*, 1827. See *Richards v. Lewis*, 1852). The second branch of this dilemma is unanswerable, but the first is open to much doubt; for even if the fact of the deed not being traced into the hands of the apprentice could preclude the necessity of searching in that quarter (as to which see post, § 434, n. 2), it could not discharge the parties of laches, in having neither called the personal representative of the master, nor even examined his papers. Perhaps, however, the case may best be supported on the grounds stated in the text a few words further on. In *City of Bristol v. Wait*, 1834, too, Alderson, B., held that, in order to let in secondary evidence of the appointment of one of the defendants as overseer, it was sufficient to show that one of the witnesses had asked him for his appointment, and that he had said he had lost it, whereupon no search was made. See, also, *R. v. Fordingbridge*, 1858.

been held¹ that, in order to show that search has been made for a document, so as to let in secondary proof of its contents, hearsay evidence of the answers given by persons who were likely to have it in their custody ought to be received.²

§ 431. If an instrument ought to have been deposited in a public office, or other particular place, it will generally be deemed sufficient to have searched that place, without calling the party whose duty it was to have put it there, or any other person who may have had access to it. For example, where a parish indenture of apprenticeship was proved to have been given to a person since dead to take to the overseers, and a fruitless search had been made for it in the parish chest, which was the proper repository for such instruments, secondary evidence was admitted without more;³ where it was the duty of a paying clerk of a parish to deposit a certain cancelled cheque in a room of the workhouse, an application to the successor of this clerk for an inspection of the cheques in the room, and an ineffectual examination of several bundles, which were handed to the party searching by the successor, was deemed a sufficient search to let in secondary evidence, though no notice to produce had been served on the first clerk, he being the defendant in the cause, and though the person who succeeded him in the office was not called;⁴ and on proof by the high constable, who levied under it, that he had deposited it in his office, and had sought for it there in vain, secondary evidence of the contents of a warrant issued by the defendant has been received, and this though the constable added that the town-clerk had access to the office, and it was objected that the defendant should have been served with a notice to produce the warrant, and the town-clerk with a subpoena duces tecum.⁵

¹ *R. v. Kenilworth*, 1845 (Cole-ridge, J.).

² *R. v. Braintree*, 1859; *R. v. Kenilworth*, 1845; *Smith v. Smith*, 1876 (Ir.).

³ *R. v. Stourbridge*, 1828. See *Minshall v. Lloyd*, 1837.

⁴ *M'Gahey v. Alston*, 1836.

⁵ *Fernley v. Worthington*, 1840. Where, however, it appeared that a solicitor, who had prepared an agreement between the plaintiff and defendant, had sent it after execution to the defendant by his clerk, and this clerk was not called (having

quitted the service of the solicitor a long time back), but the defendant's clerk stated that he had searched for the deed in his counting-house, where the transactions to which it referred were all carried on, and where books containing entries relating to these transactions were kept; the case, on this state of facts, and without the expression of any opinion as to the effect of the absence of the solicitor's clerk, was referred back to a master, in order that a further search might be made at defendant's private residence, since

C. IV.] SEARCH FOR LOST WRITINGS—PROPER CUSTODY.

§ 432. It is often difficult to ascertain what is the *proper custody* of an instrument,¹ and it will then always be expedient, and sometimes necessary, to search several places. For example, where a marriage settlement, after providing a portion for younger children, and vesting a legal term in trustees to secure it, reserved an ultimate remainder to the settlor's heir, a search among the papers of the surviving younger child was held insufficient to let in secondary evidence of its contents, as the papers of the surviving trustees, and of the heir, should also have been examined;² an expired indenture of apprenticeship remains sometimes with the master, sometimes with the apprentice, but, since the apprentice has the greatest interest in its preservation,³ stricter inquiry should be made of him than of the master, and in the absence of positive proof respecting the possession, caution would suggest what strict law might not require⁴—a search among the papers of both. Search for an expired lease should be made among the papers of both lessor and lessee,⁵ whether a term has come to an end by efflux of time or by forfeiture, since the lessee will have a right to keep the deed, for a time at least, to use in an action of covenant against the lessor, but it will frequently, after a considerable interval, be found in the landlord's possession, as constituting one of the muniments of his title.⁶

§ 433. A deed of compromise which comes from the office of the solicitor to one of the parties to it comes from the proper custody.⁷ The legal custody of a document appointing an overseer is in that

it did not appear that his clerk, who had been actively concerned in the transactions in question, had ever seen the deed at the counting-house: *Hart v. Hart*, 1841. And in *Bligh v. Wellesley*, 1826, a witness stated that he had in vain searched for some papers in a box, in which he thought he had put them, but that he still fancied they were somewhere in his possession, though he had not looked elsewhere for them; this was insufficient (*Best, C.J.*).

¹ As to this, see post, §§ 659—664.

² *Cruise v. Clancy*, 1844 (*Ir.*) (*Sugden, C.*); *Richards v. Lewis*, 1852.

³ See *Hall v. Ball*, 1841.

⁴ *R. v. Hinckley*, 1863.

⁵ *Brewster v. Sewell*, 1820; *Hall v. Ball*, 1841 (*Erskine, J.*).

⁶ *Hall v. Ball*, 1841; *Plaxton v. Dare*, 1829; *Elworthy v. Sandford*, 1864; *R. v. North Redburn*, 1784 (*Buller, J.*); *Doe v. Keeling*, 1848. It has, however, never been expressly decided that a search among the muniments of the lessor alone would not let in secondary evidence; and *Bayley, J.*, on one occasion, seems to have thought that an examination of the lessee's papers would not be absolutely necessary. See cases just cited.

⁷ *Miller v. Wheatley*, 1890.

officer, he being the person most interested in it, and requiring its production as a sanction for those acts which he may be called upon to do under its authority; therefore, in the absence of proof that the other parish officers have the actual custody of such an instrument, it will not suffice to give them notice to produce it, but before secondary evidence can be received it will be necessary to call the overseer himself.¹

§ 434. If the party entitled to the custody of a document be *dead*, inquiries should generally be made of his personal representatives, and if the document relate to real estate, of the heir-at-law also. But these steps will not be necessary should it appear that another party is in possession of the papers of the deceased. Therefore, where the master of an apprentice, being possessed of the indenture, failed, and an attorney took the custody of his papers, a search among these papers by the attorney, after the master's death, was held sufficient to let in secondary evidence of the deed of apprenticeship, though no inquiries had been made of the master's widow.²

§ 435. The law does not, moreover, require that the search should have been *recent*, or made for the *purposes of the cause*. Therefore, a search made amongst the proper papers three years before the trial, was held sufficient, though it would have been more satisfactory had the papers been again examined.³ If an instrument were executed in duplicate, or triplicate, &c., the loss of all the parts must be proved, in order to let in secondary evidence of the contents;⁴ and, in every case, before such evidence will be admissible, the original instrument must be shown to have been duly executed, and to have been otherwise genuine.⁵ If the instrument were of such a nature as to have required attestation,⁶ the attesting witness must, if known, be called, or in the event of his death, his handwriting must be proved, precisely in the same manner as if the deed itself had been produced; though, if it cannot be discovered who the attesting witness was, this strictness of proof will, from

¹ R. v. Stoke Golding, 1817.

² R. v. Piddlehinton, 1832.

³ Fitz v. Rabbits, 1837.

⁴ R. v. Castleton, 1795; Alivon v. Furnival, 1834. See ante, § 391.

⁵ Goodier v. Lake, 1737; R. v.

Culpepper, 1696; Doe v. Whitefoot, 1838; Jackson v. Frier, 1819 (Am.); Kimball v. Morrell, 1826 (Am.).

⁶ See, however, as to documents not requiring attestation, 28 & 29 V. c. 18, § 7.

necessity, be waived. In the absence of evidence to the contrary, the court will presume that a lost instrument was duly stamped.¹

§ 436. In the Court of Probate where a will itself has, after the death of the testator, been irretrievably lost or destroyed, if its *substance* can be distinctly ascertained (either by the original instructions, by a copy of the will, or even by the recollection of witnesses who have heard it read) probate may be granted of a copy embodying such substance.² On one remarkable occasion the contents, or rather a large portion of the contents, of a lost will, were allowed to be proved by the testimony of a single interested witness, whose veracity and competency were unimpeached; and probate granted to the extent of the proof.³ In all cases, however, of this nature, the jurisdiction of the court must be exercised with the greatest possible caution; and a judge will scarcely feel justified in acting on the evidence, unless it be of the most cogent and irrefragable character, not only free from suspicion in its sources, but exact and certain in its conclusions.⁴

§ 437. Notwithstanding the rule, which in general enables parties to prove, by secondary evidence, the contents of documents which have been lost or destroyed, in certain cases prior to the year 1854, no action could be maintained either upon certain written instruments themselves or even upon the consideration on which they were founded, without the production of such written instruments themselves. Thus, no action could at law be sustained on a *lost bill of exchange*, promissory note, or cheque, or on their respective considerations, provided the instrument had been originally drawn payable to order, or bearer, and provided the fact of the loss had been specially pleaded.⁵ The payee of a lost instrument of the description indicated was, to recover payment, formerly compelled

¹ Ante, § 148.

² Wharram v. Wharram, 1863; Podmore v. Wharton, 1864; Moore v. Whitehouse, 1864; In re Body, 1864; In re Barber, 1866; Wood v. Wood, 1866; Finch v. Finch, 1867; Burls v. Burls, 1868; In re Callan, 1874 (Ir.); Mahood v. Mahood, 1874 (Ir.). See post, § 550.

³ Sugden v. Ld. St. Leonards, 1876.

⁴ Cases in last note but one.

⁵ Ramuz v. Crowe, 1847; Crowe v. Clay, 1854; Hansard v. Robinson, 1827; Pierson v. Hutchinson, 1809; Mayor v. Johnson, 1813; Davis v. Dodd, 1812; Champion v. Terry, 1822; Bevan v. Hill, 1810; Woodford v. Whiteley, 1830. See Alexander v. Strong, 1842; Lubbock v. Tribe, 1838; Blackie v. Pidding, 1848; and Charnley v. Grundy, 1854.

to resort to a court of equity.¹ But the law on this subject was altered in 1854 by the Common Law Procedure Act of that year (which appears to be still in force) and the Bills of Exchange Act, 1882, repeats very similar provisions.²

§ 438. The second case³ in which the contents of a written document may be proved by *secondary evidence*, is when its production is either *physically impossible*, or *highly inconvenient*. Thus,⁴ *inscriptions on walls* and *fixed tables*, *mural monuments*, *gravestones*, *surveyors' marks* on boundary trees, notices affixed on boards to warn trespassers, and the like, may be proved by secondary evidence, since they cannot conveniently, if at all, be produced in court.⁵ For instance, on one occasion a man was convicted of

¹ *Warmesley v. Child*, 1749; *Toulmin v. Price*, 1800; *Ex parte Greenway*, 1802; *Macartney v. Graham*, 1828; *Davies v. Dodd*, 1817; *Mossop v. Eadon*, 1810.

² § 87 of "The Common Law Procedure Act, 1854" (17 & 18 V. c. 125), is as follows:—"In case of any action founded upon a bill of exchange or other negotiable instrument," which words will include a bank note (*M'Donnell v. Murray*, 1859), or a lost half of a bank note (see *Byles on Bills*, 1891 edit., p. 394)—"it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given, to the satisfaction of the court or judge, or a master, against the claims of any other person upon such negotiable instrument" (see *Aran-guerin v. Scholfield*, 1856; *King v. Zimmermann*, 1871). If the payee of a lost note can show that the instrument was never negotiable, as having been originally made payable to himself alone, he cannot, as it would seem, be called upon to give an indemnity under this clause, but the action will be sustainable, either on the instrument itself, or on the consideration; because, in such case, the defendant cannot be rendered liable to pay the amount a second time (*Wain v. Bailey*, 1839; recognized in *Ramuz v. Crowe*, 1847; *Clay v. Crowe*, 1853. As to what is

the effect of the bill being *destroyed*, see § 322 of the 1st edit. of this work, and *Wright v. Ld. Maidstone*, 1855 (*Wood, V.-C.*). See, too, *Confians Quarry Co. v. Parker*, 1867; where circular notes having been lost, the party losing them was held not entitled to sue the bankers for money had and received). §§ 69 and 70 of "The Bills of Exchange Act, 1882" (45 & 46 V. c. 61) are as follow:—

§ 69. "Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenour, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

"If the drawer, on request as aforesaid, refuses to give such duplicate bill, he may be compelled to do so."

§ 70. "In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question."

³ See *supra*, § 428B.

⁴ *Gr. Ev.* § 94, in part.

⁵ *Mortimer v. McCallan*, 1840 (*Ld. Abinger and Alderson, B.*); *R. v. Fursey*, 1833; *Doe v. Cole*, 1834 (*Patteson, J.*); *Bartholomew v.*

writing a libel on the wall of the Liverpool gaol, on mere proof of his handwriting.¹ In order, however, to let in this description of secondary evidence, it must clearly appear that the document or writing is affixed to the freehold, and cannot easily be removed; and therefore, where a notice was merely suspended to the wall of an office by a nail, it was considered necessary to produce it at the trial.² If, too, a document be deposited in a foreign country, and the laws or established usage of that country will not permit its removal, secondary evidence of the contents will be admitted, because in that case, as in the case of mural inscriptions, it is not in the power of the party to produce the original.³

§ 439.⁴ On a similar ground, the existence and contents of any record of a judicial court, and of entries in any other *public books or registers*, may be proved by an examined copy, and in some cases by an office copy, by a certified copy, or even by a mere certificate.⁵ This rule extends to all records and entries of a public nature in books required by law to be kept; and is adopted,—partly, because of the serious risk of loss which the removal of such documents would occasion,—partly, because of the inconvenience which the public might experience from the removal, especially if the documents were wanted in two or more places about the same time,—and partly, because of the public character of the facts recorded, and the consequent facility of detection of any fraud or error in the copy.⁶

§ 439A. For very similar reasons, too, and on grounds of convenience, in an action for infringement of a copyright in a picture

Stephens, 1839 (*id.*); *Bruce v. Nicopolulo*, 1855.

¹ Mentioned by *Ld. Abinger in Mortimer v. M'Callan*, 1840.

² *Jones v. Tarleton*, 1842. On one occasion, indeed, the Committee for Privileges in the House of Lords received in evidence, as proof in a pedigree, a copy of a plate of the arms of the Knights of the Garter, which had been put up in the Chapel Royal at Windsor in the reign of Henry V., and which, being fastened to the building only by screws, was physically removable; but this case seems to rest, at least partly, on the ground that the plate in question

could not have been removed without a special warrant from the Queen. Semble, this evidence would not have been admissible had not the question at issue related to a *pedigree*: *Berkeley Peerage*, 1858-61, H. L.; *Shrewsbury Peerage case*, 1857, H. L.

³ *Burnaby v. Baillie*, 1889; *Alivon v. Furnival*, 1834; *Boyle v. Wiseman*, 1855; *Quilter v. Jorss*, 1853. See 14 & 15 V. c. 99 ("The Evidence Act, 1851"), § 7; and *Crispin v. Doglioni*, 1862.

⁴ *Gr. Ev.* § 91, in part.

⁵ This subject will be discussed post, §§ 1534 et seq.

⁶ *B. N. P.* 226.

it is not necessary to produce the original picture, but the infringement may be proved by persons who, on looking at the infringement in court, say that it resembles it.¹

§ 440. The third case in which secondary evidence of a written document is admissible is when a document is in the *possession of the adversary, who withholds it at the trial, and a notice to produce the original has been duly served, where such notice is requisite.*² This rule applies equally both in civil and criminal cases. In either mode of proceeding, in order to render the notice available, it must, however, be first shown that the instrument is in the hands, or under the control, of the party required to produce it.³ Very slight evidence will raise a sufficient presumption of this where the document exclusively belongs to or in the regular course of business ought to be in the custody of a party served. Therefore, where a bankruptcy certificate was proved to have been obtained for a defendant, the court presumed that it had come into his possession;⁴ while, if papers were last seen in the hands of a defendant, it lies upon him to trace them out of his possession,⁵—and for this purpose he may interpose with evidence while the plaintiff's case is proceeding, and, such evidence being submitted to the judge alone,⁶ its admission does not give the plaintiff's counsel a right to reply to the jury.⁷ Where a party has notice to produce a particular instrument which has been traced to his possession, he cannot, it seems, object to parol evidence of its contents being given, on the ground that, *previously to the notice*, he had ceased to have any control over it, unless he has stated this fact to the opposite party, and has pointed out to him the person to whom he delivered it.⁸ Neither can he escape the effect of the notice, by *afterwards* voluntarily parting with the instrument, which it directs him to produce.⁹

¹ Williams v. Lucas, 1892, C. A.

² R. v. Watson, 1788 (Buller, J.); Att.-Gen. v. Le Marchant, 1772; Cates v. Winter, 1789. As to the presumption respecting the stamp, see ante, § 148.

³ Sharpe v. Lamb, 1840.

⁴ Henry v. Leigh, 1813 (Id. Ellenborough). See, also, Robb v. Starkey, 1845.

⁵ R. v. Thistlewood, 1820; R. v. Ings, 1820.

⁶ Supra, §§ 23 et seq.

⁷ Harvey v. Mitchell, 1841 (Parke, B.); Smith v. Sleep, 1843 (Alderson, B.).

⁸ Sinclair v. Stevenson, 1824 (Best, C.J.). In Knight v. Martin, 1819, where secondary evidence was held inadmissible, the party, who was served with notice to produce a lease, told his opponent that he had assigned it.

⁹ Per Dallas, C.J., in Knight v. Martin, 1819.

§ 441. If an instrument be in the possession of a person in *privity* with the party, such as his banker,¹ agent, servant, deputy, or the like, such person need not be served with a subpoena duces tecum, or even be called as a witness, but a notice given to the party himself will suffice.² For example, the admission of secondary evidence will be justified by a notice to a shipowner to produce papers, though the captain has possession of them for his own protection,³—or by a notice to a sheriff to produce a warrant, which is shown to have been returned to the under-sheriff during the time that the sheriff remained in office;⁴ and a document deposited in a court of equity by a party to a suit, and scheduled in his answer, which had been ordered to be delivered to him, was held to be sufficiently within his control to let in secondary evidence after notice to produce, though it appeared that, at the time of the trial, the document was still in the hands of an officer of the court.⁵ But the party served with the notice to produce must have such a right to the instrument which is the subject of it as would entitle him not merely to inspect it, but to retain it. Therefore, where a document is held by a stakeholder between the defendant and a stranger to the cause,⁶ or where it has been delivered to a third person, under whom the defendant has justified in an action of trespass, and by whose directions he acted,⁷ parol evidence of its contents must be rejected, notwithstanding that a notice to produce has been duly served on the defendant.

§ 441A. A proper notice to produce is, however, in all these cases necessary before secondary evidence becomes admissible. A few remarks as to the form and service of such a notice will, therefore, not be out of place here.

§ 442. The notice must, it seems, not only be in *writing*,⁸ but, so far as civil proceedings are concerned, must be in a special

¹ Partridge v. Coates, 1824 (Abbott, C.J.); Burton v. Payne, 1827 (Bayley, J.).

² Sinclair v. Stevenson, 1824 (Best, C.J.).

³ Baldney v. Ritchie, 1824 (Ld. Ellenborough).

⁴ Taplin v. Atty, 1825; Suter v. Burrell, 1857.

⁵ Rush v. Peacock, 1838 (Ld. Denman).

⁶ Parry v. May, 1833 (Littledale, J.).

⁷ Evans v. Sweet, 1824 (Best, C.J.).

⁸ See R. S. C. 1833, Ord. LXVL, r. 1.

form.¹ It may be directed to the party or to his solicitor, and may be served on either.² Indeed, it will be sufficient to leave the notice with a servant of the party at his dwelling-house, or with a clerk at the solicitor's office.³ Where the solicitor has been changed, a notice served on the first solicitor before the change will suffice; for otherwise the effect of the notice might be easily evaded by changing the legal adviser on the eve of the trial.⁴ A notice duly served on the party will not be rendered invalid by a subsequent bad service on the solicitor.⁵

§ 443. It is difficult to lay down any general rule as to *what a notice to produce ought to contain*, since much must depend on the particular circumstances of each case. No misstatement or inaccuracy in the notice will, however, be deemed material, if not really calculated to mislead the opponent.⁶ Neither is it necessary, by condescending minutely to dates, contents, parties, &c., to specify the precise documents intended. Indeed, to do so may be dangerous, since if any material errors were inadvertently made, the party sought to be affected by the notice might urge, with possible success, that he had been misled thereby. If enough is stated on the notice to induce the party to believe that a particular

¹ Order XXXII. r. 8. The form is as follows:—

No. 14. App. B.

[Heading as in Form 1.]

"Take notice, that you are hereby required to produce and show to the court on the trial of this _____ all books, papers, letters, copies of letters, and other writings and documents in your custody, possession, or power, containing any entry, memorandum, or minute relating to the matters in question in this _____, and particularly _____.

Dated the day of , 18 .

To the above-named _____

h solicitor or agent.

(Signed) _____, of _____, agent for
named _____, solicitor for the above-
_____."

* Hughes v. Budd, 1840; R. v. Barker, 1858; R. v. Boucher, 1859; Houseman v. Roberts, 1832; Cates v. Winter, 1789. This last case was a qui tam action. See R. v. Downham, 1858.

³ *Evans v. Sweet*, 1824 (Best, C.J.).

⁴ Doe v. Martin, 1832 (Tindal, C.J.).

⁵ Hughes v. Budd, 1840 (Patteson, J.).

⁶ *Justice v. Elstob*, 1858; *Graham v. Oldis*, 1858.

instrument will be called for, this will be sufficient.¹ But a notice to produce "all letters, papers, and documents, touching or concerning the bill of exchange mentioned in the declaration, and the debt sought to be recovered,"² has been held too vague to admit secondary proof of a notice of dishonour sent by the plaintiff to the defendant. And in an action³ against four defendants, as owners of a sloop, to recover an account for warehousing the rigging of the vessel, in order to prove that one defendant was a joint owner, the plaintiff called for a letter, which was stated to have been written nine years before by this defendant to the son of another defendant, and relied upon a "notice to produce letters and copies of letters, and all books relating to the cause," but the court decided that the notice was too uncertain, and no sensible man could entertain a different opinion. It is believed that many judges still act upon these old principles, though later decisions justify a greater laxity of practice.⁴

§ 444. In an old case, a notice which misdescribed the title of the cause was held invalid;⁵ but an objection to a notice on the ground that it was entitled (by mistake) in a wrong court, was overruled, Alderson, B., saying, "One does not know where we are to stop. Would the notice be bad if one of the names was spelt wrong? . . . At the time of the decision in *Harvey v. Morgan*, the courts were much more strict than now as to matters of this nature."⁶

¹ See *Rogers v. Custance*, 1839.

² *France v. Lucy*, 1825 (Best, C.J.).

³ *Jones v. Edwards*, 1825.

⁴ Thus, a notice to produce "all letters written by the plaintiff to the defendant, relating to the matters in dispute in the action" (*Jacob v. Lee*, 1837 (Patteson, J.); see, also, *Connybear v. Farries*, 1869), or "all letters written to or received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person in their behalf, and also all books, papers, &c., relating to the subject-matter of this cause" (*Morris v. Hauser*, 1841 (Ld. Denman)), have respectively been held sufficient to let in parol evidence of a particular letter not otherwise specified. In these cases the names of the parties by and to whom the letters were

addressed appeared on the notice. This was pointed out and relied upon by Patteson, J., in *Jacob v. Lee*, 1837. The Court of Queen's Bench, in an action for work and labour, also decided that a notice to produce "all accounts relating to the matters in question in this cause," comprehended with sufficient precision a particular account relating to a small part of the work, though it appeared that many such accounts for different parts of the work had been rendered by the plaintiff to the defendant: *Rogers v. Custance*, 1837.

⁵ *Harvey v. Morgan*, 1816. The notice in that case was entitled "A. & B., assignees of C. & D., v. E.," instead of "A. & B., assignees of C., v. E."

⁶ *Lawrence v. Clark*, 1845.

§ 445. As to the *time* and *place* of the *service*, no more precise rule can be laid down, than that it must be such as to enable the party, under the known circumstances of the case, to comply with the call.¹ If the person to be served, whether client or solicitor, dwell in another town than that in which the trial is had, he must generally be served before the commission day.² Service after he has left home to attend the court will usually be insufficient.³ In town causes, however, and in country causes, where the solicitor lives in the assize town, a shorter notice will suffice, and if the documents be such as may reasonably be presumed to be in the solicitor's possession, service on him, or at his office, before six o'clock⁴ in the afternoon of the day preceeding the trial, will generally be sufficient;⁵ though, if the documents would probably be in the client's custody,—as, for instance, if they were a tradesman's books,⁶ or if they were letters or papers not obviously connected with the cause,—such service would be too late.⁷ And a notice during the trial of a town cause lasting twelve days, given on one day during the trial for the next, is not sufficient.⁸ If a party be served with notice sufficiently early to enable him to produce the document, it makes no difference that at the time of the service the cause is part heard.⁹

§ 446. If the party served with a notice to produce can prove that his papers are in a *foreign* country, or at such a distance from the place of trial as to render it impossible for him to produce them under an ordinary notice, such a notice will be inoperative. The

¹ *R. v. Hankins*, 1849; *R. v. Kitson*, 1853.

² *Trist v. Johnson*, 1833 (Park, J.); *R. v. Ellicombe*, 1833 (Littledale, J.); *Lessee of Leader v. Duggan*, 1841 (Ir.); *Humphrey v. St. Leger*, 1841 (Ir.); *M'Master and Boyle's case*, 1843 (Ir.). See *Howard v. Williams*, 1842.

³ *George v. Thompson*, 1836; *Hargest v. Fothergill*, 1832 (Taunton, J.).

⁴ See post, § 1586A, citing *Ord. LXIV.*, r. 11, of R. S. C. 1883.

⁵ *Atkins v. Meredith*, 1836; *Leaf v. Butt*, 1842 (Alderson, B.); *Meyrick v. Woods*, 1842 (id.); *Firkin v. Edwards*, 1840 (Williams, J.); *Gibbons v. Powell*, 1840 (Gurney, B.); *R. v. Hamp*, 1852 (Ld. Campbell); *Holt v.*

Miers, 1839; *Lawrence v. Clark*, 1845. If the trial is to take place on the Monday, a service on the Sunday, or even on Saturday after 2 p.m. (see rule cited in last note), will not do; and perhaps a service on a Sunday would in any event be bad. See *Hughes v. Budd*, 1840 (Patteson, J.); and 29 Car. 2, c. 7, § 6 ("The Sunday Observance Act, 1677").

⁶ *Atkins v. Meredith*, 1836.

⁷ *Bryne v. Harvey*, 1838 (Ld. Denman); *Vice v. Lady Anson*, 1827 (Ld. Tenterden); *Affalo v. Fourdrinier*, 1829 (Tindal, C.J.).

⁸ *Sugg v. Bray*, 1885.

⁹ *Sturm v. Jeffree*, 1847 (Pollock, C.B.).

courts, however, incline to favour the sufficiency of the notice, whenever the circumstances will warrant it. For example, where a party had gone abroad, leaving the cause in the hands of his solicitor, it was presumed that he had left with him all papers material to the cause, and, consequently, a notice served on the solicitor the evening next but one before the trial, was held to be sufficient;¹ a four days' notice, given to the defendant to produce letters written by him to his partner in New South Wales, was considered good, where long litigation on the subject of them made it presumable that they had been remitted to this country;² and even a similar notice to a foreign defendant was sufficient where the action had commenced only seven months before the trial, though the letters required had been addressed to him eighteen years before at his residence abroad, Abbott, C. J., observing that it would lead to great inconvenience and delay if trials were allowed to be postponed upon such an objection.³

§ 447. However, a party who seeks the production of papers must not put his adversary to needless trouble and expense. A solicitor who, having been served in Essex with notice to produce certain deeds, fetched them from London, and on the commission day was served with a fresh notice to produce another deed, which he on being served stated was also in town, but then said that it should be forthcoming at the trial if the other side would pay the expenses of a messenger, after this offer had been declined, was held justified, in the absence of payment of such expenses, in not complying with the notice, and it also was held that secondary evidence was not rendered admissible by such second notice.⁴ If a party, on being served with a notice to produce a document, states that it is not in existence, parol proof of its contents will be received, and no objection can be taken to the lateness of the service.⁵ A notice to produce certain documents "upon the trial of the cause," applies not merely to the trial which it immediately precedes, but to every subsequent trial of the same cause which may take place.⁶

¹ *Bryan v. Wagstaff*, 1825 (Abbott, C.J.).

² *Sturge v. Buchanan*, 1839.

³ *Drabble v. Donner*, 1824. But see *Ehrenspergen v. Anderson*, 1848.

⁴ *Doe v. Spitty*, 1832. Perhaps the second notice, having been served on

the commission day, would have been too late, independent of the special circumstances.

⁵ *Foster v. Pointer*, 1841 (Gurney, B.).

⁶ *Hope v. Beadon*, 1851.

§ 448. By R. S. C., 1883, Order XXXII. r. 8, "An affidavit of the solicitor, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served."

§ 449. In *seven cases* notice to produce is not necessary, viz.: (1) where a duplicate original or a counterpart is at hand; (2) where the document required is itself a notice; (3) if the form of the proceedings tells the party that he will be charged with the possession of the instrument and called on to produce it; (4) in odium spoliatoris; (5) in the case of agreements by sailors with masters of ships; (6) where the document required is admittedly lost; and (7) where it is actually in court.

§ 449A. Each of these seven cases requires a few separate words of notice.

§ 449B. The first of such seven cases is, where the instrument in the possession of the adversary, and that tendered in evidence, are either *duplicate originals*,¹ or are *counterparts*, and the part offered in evidence has been executed by the adversary, or by some person through whom he claims. The instrument produced is, as before stated, considered primary evidence, not secondary.²

§ 450. The second of the seven cases just indicated arises where the instrument to be proved is itself a *notice*. This exception appears to have been originally adopted in regard to notices to produce, for the obvious reason, that, if a notice to produce such a document were necessary, the series of notices would become infinite.³ The exception has subsequently been extended to other

¹ *Colling v. Treweek*, 1827 (Bayley, J.); *Philipson v. Chase*, 1809 (Ld. Ellenborough).

² *Ante*, § 426.

³ 3 St. Ev. 730; *Philipson v. Chase*, 1809. But see *ante*, § 448. This has arisen, partly, perhaps, from a misapprehension of the ground on which the doctrine rests (in *Philipson v. Chase*, 1809, Ld. Ellenborough observes: "Wilson, J., said that if a duplicate of the notice to quit was not of itself sufficient, no more ought a duplicate of the notice to produce, and thus notices might be required in infinitum"). The foregoing reasoning is fallacious. See 3 St. Ev. 3rd edit. (1842) 730. The real reasons for the

rule are, partly, the experienced inconvenience attendant on a strict observance of the rule requiring notice (2 Ph. Ev. 226, n. 5); partly, because the secondary evidence that is usually offered of a notice is a copy of the paper sent, which partakes in great measure of the character of a duplicate original (*Kine v. Beaumont*, 1822); and, chiefly, because it constantly happens that the opposite party is well aware, from the nature of the action, that he will be charged with the possession of the original document (*Colling v. Treweek*, 1827 (Bayley, J.); *Robinson v. Brown*, 1845 (Maule, J.). See post, § 452).

notices, and now lets in proof by copies, if not by any species of secondary evidence, of a notice to quit;¹ of a notice of dishonour;² provided the action be brought upon the bill, but not otherwise;³ of all such notices of action, or written demands, as are necessary to entitle the plaintiff to recover;⁴ and of bills of costs of solicitors, and parliamentary agents, delivered pursuant to statute.⁵

§ 451. An exception to the general principle, that no notice to produce a notice is usually required, appears to exist in all cases in which the notice required to be produced has been served on a third person.⁶ Accordingly, where two parties had become sureties, by a joint and several bond, for the payment, within one month after notice should have been given to them, of such sum as should be due from their principal, it has been held that the service of notice upon one of the parties cannot be proved in an action brought against the other, by producing the duplicate of the notice, but that the first party should have been subpoenaed to produce the original, or to account for its non-production.⁷

§ 452. The third of the seven cases in which a notice to produce is unnecessary, is where from the nature of the action, or indictment, or from the form of the pleadings, the *defendant must know* that he will be charged with the possession of an instrument, and be *called upon to produce it*.⁸ For instance, in an action of trover for con-

¹ Doe v. Somerton, 1845; Jory v. Orchard, 1779 (Ld. Eldon); Colling v. Treweek, 1827 (Bayley, J.). See R. v. Mortlock, 1845.

² Swain v. Lewis, 1835; Kine v. Beaumont, 1822; Ackland v. Pearce, 1811 (Le Blanc, J.); Roberts v. Bradshaw, 1815; Colling v. Treweek, 1827 (Bayley, J.). The first two of these cases were decided after conferring with the judges of the other courts, and put the question beyond dispute, overruling Langdon v. Hulls, 1804, and Shaw v. Markham, 1791.

³ Lanauze v. Palmer, 1827 (Abbott, C.J.).

⁴ Jory v. Orchard, 1799.

⁵ Colling v. Treweek, 1827, decided on § 23 of the repealed Act (2 G. 2, c. 23), but equally applicable to § 37 of 6 & 7 V. c. 73 ("The Solicitors

Act, 1843"). In an action against a surety, on a bond conditioned to pay the plaintiff the principal within six months after notice, Lord Ellenborough, however, held a notice to produce this notice to be necessary, on the ground that it was not a mere notice, but in the nature of a statement of account between the plaintiff and the principal (Grove v. Ware, 1817). Whether this case would now be considered a binding authority may well be questioned, since, in principle, it is difficult to distinguish it from several of the cases cited above, in which notice to produce has been deemed unnecessary.

⁶ Robinson v. Brown, 1846.

⁷ Id.

⁸ Colling v. Treweek, 1827 (Bayley, J.). See ante, §§ 407, 408.

verting a bond, a bill of exchange, or other writing,¹ or in a prosecution for stealing any document,² the counsel for the plaintiff or the Crown may at once produce secondary evidence of its contents, even though the defendant offer to produce the document itself.³ A like rule prevails in an action on contract against a carrier for the non-delivery of written instruments,⁴ as also in indictments for conducting a traitorous correspondence.⁵ It is, however, inapplicable on a charge of forging a deed;⁶ or on an indictment for arson, with intent to defraud an insurance office.⁷ Similarly, it is the necessary (though reverse) consequence of this rule that a plaintiff may object to a defendant, who is the maker of a note or cheque, or the acceptor of a bill, the making or acceptance of which is not denied by the latter's pleadings, and is therefore admitted on the record,⁸ giving secondary evidence of its contents, for the purpose even of identification, unless a notice to produce has been duly served,⁹ or unless the instrument is shown to be in court.¹⁰

§ 453. The fourth case, in which a notice to produce is not necessary, is where possession of the paper, the production of which is required, has been obtained by the adverse party, fraudulently or forcibly, as where, after action brought, he has received it from a witness, in fraud of a subpoena duces tecum.¹¹ In such cases "in odium spoliatoris" a notice to produce is not required to be given to him before admitting secondary evidence of the contents of the document of which he has improperly obtained possession.

§ 454. The fifth case in which notice to produce is not needed, is, that by statute every seaman may bring forward evidence to prove

¹ *Scott v. Jones*, 1813; *How v. Hall*, 1811; *Bucher v. Jarratt*, 1802. These cases overrule *Cowan v. Abrahams*, 1793.

² *R. v. Aickles*, 1784; *R. v. Brennan*, 1843 (Ir.) (Perrin, J.).

³ *Whitehead v. Scott*, 1830 (Ld. Tenterden).

⁴ *Jolley v. Taylor*, 1807 (Sir J. Mansfield, C.J.).

⁵ *R. v. De la Motte*, 1781; *Layer's case*, 1722.

⁶ *R. v. Haworth*, 1830 (Parke, J.). See *Spragge's case* (no date given; decided by Buller, J.), cited by Ld. Ellenborough, 1811; also *R. v. Ellworthy*, 1867, C. C. R.

⁷ *R. v. Ellicombe*, 1834 (Littledale, J.); *R. v. Kitson*, 1852. See *R. v. Humphries*, 1829; *R. v. Mortlock*, 1845.

⁸ The plaintiff, however, cannot recover interest on the bill from the date of its maturity without producing it: *Hutton v. Ward*, 1850; *Chaplin v. Levy*, 1854 (Parke, B.).

⁹ *Goodered v. Armour*, 1842; explaining *Read v. Gamble*, 1839; *Lawrence v. Clark*, 1845. See, also, *Chaplin v. Levy*, 1854 (Parke, B.).

¹⁰ *Dwyer v. Collins*, 1852.

¹¹ *Leeds v. Cook*, 1803 (Ld. Ellenborough); *Doe v. Ries*, 1831.

the contents of his agreement with the master of the ship, or otherwise to support his case, without producing, or giving notice to produce, the agreement itself or any copy of it.¹ The reason for this indulgence is the proverbial inexperience and recklessness of seafaring men.

§ 455. The sixth instance in which notice to produce is dispensed with is where either the adverse party or his solicitor has admitted that a document is lost—for in such case the notice would be nugatory,²—or where, as it seems, the party in possession of the writing might himself give secondary evidence of its contents without producing it, as, for instance, if it be an inscription or notice attached to the freehold.³ Under this exception, however, a party cannot call witnesses to *prove* the destruction of a document that has been traced into the hands of his opponent, and then show its contents by secondary proof, unless he has first served a notice to produce, since (notwithstanding the evidence to the contrary) the document may still be in existence, or, at any rate, the opponent may dispute the fact of its having been destroyed.⁴

§ 456. In the seventh, and last, place, notice to produce is unnecessary if it be proved that the adverse party, or his solicitor, has the original instrument in court. For the object of the notice is not,—as was formerly thought,⁵—to give the opposite party an opportunity of providing the proper testimony to support or impeach the document, but merely to enable him to produce it, if he likes, at the trial, and thus to secure the best evidence of its contents.⁶ If a solicitor, on being called by his client's opponent to state whether he has a particular document in court, asserts that he does not know whether he has it with him or not, and that he does not intend to ascertain that fact, unless compelled to do so by the judge, it is undecided whether or not he will then be ordered to search among his papers; probably he will.

¹ 57 & 58 V. c. 60 ("The Merchant Shipping Act, 1894"), § 123. See *Bowman v. Manzelman*, 1809.

² *R. v. Haworth*, 1830 (Parke, J.); *Foster v. Pointer*, 1841 (Gurney, B.); *How v. Hall*, 1811 (Ld. Ellenborough); *Doe v. Spitty*, 1832.

³ *Bartholomew v. Stephens*, 1839 (Patteson, J.).

⁴ *Doe v. Morris*, 1835.

⁵ *Bate v. Kinsey*, 1834; *Cook v. Hearn*, 1832 (Patteson, J.); *Doe v. Grey*, 1816 (Ld. Ellenborough); *Exall v. Partridge* (no date given), cited (by Scarlett, *arg.* *Doe v. Grey*) as having been ruled by Ld. Kenyon.

⁶ *Dwyer v. Collins*, 1852.

§ 456A. The R.R. S. C. provide that "if a notice to produce comprises documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice."¹

§ 457. The fourth² class of cases in which secondary evidence as to documents is admissible, is when a document is in the hands of a stranger, who is either *not compellable by law* to produce it, and who justifiably *refuses* to do so either when summoned as a witness with a subpoena duces tecum,³ or, when having been sworn as a witness without a subpoena, he admits that he has the document in court.⁴ The mere *disobedience* of a person served with a subpoena duces tecum will not render admissible secondary evidence of the contents of the document which he is called upon to produce.⁵ To do this the witness must be *justified* in refusing the production, for otherwise the party will have no remedy, except as against *him*.⁶ The rule is only recognized at all for the same reason as that which allows of parol proof, when an adversary, after notice, refuses to produce a deed in his possession,—namely, because the party offering secondary evidence has done all in his power to obtain the original document.⁷ If, therefore, a solicitor refuses to produce a deed as claiming a lien upon it, secondary evidence of its contents cannot be received, where the party tendering such evidence is the person liable to pay the solicitor's charges.⁸ And if a solicitor, who is not acting under special instructions from his client, declines to produce an instrument on the ground of privilege, it is very questionable whether the client must not be subpoenaed, in order to ascertain whether he relies on a right to withhold the deed;⁹ and it will at least be prudent to do this, inasmuch as the privilege is, in strictness, not that of the solicitor, but that of the client. If, however, the solicitor swear that his client has instructed him not to produce the instrument, it will not be necessary to subpoena the client; for in

¹ R. S. C. Ord. XXXII. r. 9.

² See § 428, *supra*, as to the three classes which preceded and as to the others which follow the present class.

³ *Marston v. Downes*, 1834; *Doe v. Ross*, 1840; *Mills v. Oddy*, 1834 (*Parke, B.*); *Doe v. Owen* (1837) can no longer be supported.

⁴ *Doe v. Clifford*, 1847 (*Alderson, B.*); *Newton v. Chaplin*, 1850.

⁵ *Jesus Coll. v. Gibbs*, 1834.

⁶ *R. v. Llanfaethly*, 1853.

⁷ *Doe v. Ross*, 1840.

⁸ *Att.-Gen. v. Ashe*, 1859 (*Ir.*). See, however, as to a claim of lien, *infra*, § 458.

⁹ *Doe v. Ross*, 1840; *Newton v. Chaplin*, 1850; *In re Cameron's Coalbrook, &c. Rail. Co.*, 1858.

such a case it would be assumed that the client, if called, would continue of the same mind.¹

§ 458. Judges always refuse to compel either a witness or a party to a cause² to produce either his title-deeds,³ or any document the production of which may tend to criminate him,⁴ or any document which he holds as mortgagee⁵ or pledgee.⁶ But a witness will not be allowed to resist a subpoena duces tecum on the ground of any lien⁷ he may have on the document called for as evidence,⁸ unless the party requiring the production be himself the person against whom the claim of lien is made.⁹ If the witness be a solicitor, though he will be *permitted*, he will certainly not be *forced*,¹⁰—except in some cases for the purpose of identification,¹¹—to produce any instrument which he holds confidentially for his client, and which the client has a right to keep back;¹² but, as just noticed, it by no means necessarily follows that, in the event of the client himself not being summoned, secondary evidence will be admissible.¹³

¹ *Phelps v. Prew*, 1854.

² The rule, so far as it relates to parties, appears to be this; a plaintiff will not be compelled to produce muniments of title which he swears do not, to the best of his knowledge, information, and belief, contain anything impeaching his case, or supporting or material to the case of the defendant: *Minet v. Morgan*, 1873.

³ *Pickering v. Noyes*, 1823; *Harris v. Hill*, 1822 (*Abbott, C.J.*); *R. v. Upper Boddington*, 1826; *Doe v. Clifford*, 1847; *Egremont Burial Board v. Egremont Iron Ore Co.*, 1880 (*Malins, V.-C.*).

⁴ See *Whitaker v. Izod*, 1809.

⁵ *Doe v. Ross*, 1840; explained by *Turner, L.J.*, in *Hope v. Liddell*, 1855; *Chichester v. Marq. of Donegall*, 1870 (*Giffard, L.J.*); *Costa Rica, Republic of v. Erlanger*, 1875.

⁶ See *Ex parte Shaw*, 1821.

⁷ In the Courts of Bankruptcy, "no person shall, as against the official receiver or trustee, be entitled to withhold possession of the books of account belonging to the debtor, or to set up any lien thereon": *Bankruptcy Rules*, 1883, r. 259.

⁸ *Hunter v. Leathley*, 1830, recognized (*Parke, B.*) in *Ley v. Bar-*

low, 1848; *Thompson v. Mosely*, 1833 (*Ld. Lyndhurst*); *Brassington v. Brassington*, 1823 (*Leach, V.-C.*); *Pratt v. Pratt*, 1882 (*Bacon, V.-C.*); *Furlong v. Howard*, 1804 (*Ir.*) (*Ld. Redesdale*); *In re Cameron's Coalbrook, &c. Rail. Co.*, 1858; *Hope v. Liddell*, 1855, overruling *Griffith v. Ricketts*, 1849. See, also, *Lockett v. Cary*, 1864 (*Romilly, M.R.*); *Ex parte Paine and Layton*, 1869, *C. A.*; *Re Toleman, Ex parte Bramble*, 1880.

⁹ *Kemp v. King*, 1842 (*Ld. Denman*), recognized in *Hope v. Liddell*, 1855. See *In re Capital Fire Ins. Assoc.*, 1883, and cases there cited. Also, *In re Cameron's Coalbrook, &c. Rail. Co.*, 1858 (*Romilly, M.R.*); *Vale v. Oppert*, 1875, *C. A.* But see *Fowler v. Fowler*, 1881 (*Kay, J.*), et qu.; *Re Martin*, 1883 (*Ir.*).

¹⁰ *Hibberd v. Knight*, 1848, explaining *Marston v. Downes*, 1834.

¹¹ *Phelps v. Prew*, 1854.

¹² *Harris v. Hill*, 1822; *Volant v. Soyer*, 1853; *Doe v. James*, 1837 (*Ld. Denman*); *Ditcher v. Kenrick*, 1824. See *Doe v. Langdon*, 1848.

¹³ This sentence was cited and approved (*Esher, M.R.*), in *Bursell v. Tanner*, 1855, *C. A.*

§ 459. The rule exempting witnesses from producing title-deeds extends to a will, under which the witness claims as devisee, though such will extend to personalty as well as to realty, and, therefore, ought to have been deposited in the Ecclesiastical Court, where the public might have had access to it.¹ But the rule will not prevail unless it appears that the title of the person possessing the document will in some way be affected by its production.² For instance, in an action of ejectment, where plaintiff's title was disputed, the solicitor of a gentleman, who had been in treaty (which ultimately went off) for the purchase of the property, was allowed to produce on behalf of the defendant the abstract delivered to his client, as furnishing secondary evidence of the contents of the deeds relating to the property, which had, after notice, not been produced.³

§ 460. However, the mere circumstance that the production of the document may render the witness liable to a *civil* action, does not entitle him to withhold it as being within the protection of the rule. For instance, in an action of ejectment, where a plaintiff claimed under a devise in remainder, and defendant held under an invalid lease by a late tenant for life, a witness, who was an executor and legatee of the late tenant for life, was compelled to produce his testator's rent-book to enable the plaintiff to identify the lands in question with the lands originally devised, notwithstanding that the witness was, as executor, bound (under a covenant contained in the lease granted by the late tenant for life) to indemnify the defendant from all loss he might sustain from an adverse verdict;⁴ and where a witness, who was steward of a borough, and attorney for the lord, declined to produce certain old precepts, books of presentment, and a case, relative to his office, on which the opinion of counsel had been taken by a former steward, saying that he held them as attorney for the lord, and that their production would prejudice his client's interest, it was held that as the precepts and presentments were public documents he was bound to produce all of them, except the case and opinion.⁵

¹ Doe v. James, 1837 (Ld. Denman).

² Lee v. Merest, 1870.

³ Doe v. Langdon, 1848.

⁴ Doe v. Date, 1842.

⁵ R. v. Woodley, 1834 (Ld. Denman).

§ 461.¹ The fifth² class of cases in which secondary evidence to prove the contents of a document is admissible, in the first place consists of those cases in which the law raises a strong presumption of the existence of such a document. For instance, the *original written appointment to a public office* need not in general be produced, in consequence of the strong presumption of the validity thereof which arises from its undisturbed exercise, but it will be sufficient to show that any such officer has *acted* in an official capacity.³

§ 462.⁴ The sixth² relaxation of the rule demanding primary proof to be given of a document before any secondary evidence of it is received, occurs where the evidence required is the result of *voluminous facts*, or of the inspection of *many books and papers*, the examination of which could not conveniently take place in court.⁵ For instance, if bills of exchange have been drawn between particular parties in one invariable mode, this may be proved by the testimony of a witness conversant with their habits of business, who speaks generally of the fact without production of all the bills;⁶ a witness who has inspected the accounts of the parties, though he may not give evidence of their particular contents, will be allowed to speak to the general balance without producing the accounts;⁷ and where the question is as to the solvency of a party at a particular time, the general result of an examination of his books and securities may be stated in like manner.⁸ But the exception under consideration will not enable a witness to state the general contents of a number of letters received by him from one of the parties in the cause, though such letters have since been

¹ Gr. Ev. § 92, in great part.

² See supra, § 428, as to what the others are.

³ See ante, § 171. See, also, Brewster v. Sewell, 1820 (Holroyd, J.).

⁴ Gr. Ev. § 93, in great part.

⁵ 1 Ph. Ev. 433. In pleading, too, a general allegation is frequently allowed, "when the matters to be pleaded tend to infiniteness and multiplicity, whereby the rolls shall be incumbered with the length thereof": *Mints v. Bethil*, 1601. See R. S. C. 1883, Ord. XIX. r. 2; Ord. LXV. r. 27, subs. 20. The courts admit the same exception,

and act on similar principles, if the parties to actions are numerous: Ord. XVI. r. 9.

⁶ *Spencer v. Billing*, 1812 (Ld. Ellenborough). If the mode of dealing has not been uniform, the case does not fall within this exception, but is governed by the rule requiring the production of the writings.

⁷ *Roberts v. Daxon*, 1791 (Ld. Kenyon). But see *Johnson v. Kershaw*, 1847, where this course was not allowed by Knight Bruce, V.-C.

⁸ *Meyer v. Sefton*, 1817 (Holroyd, J.).

destroyed, if the object of the examination be to elicit from the witness not a fact but merely an opinion or impression; for instance, the impression which the destroyed letters produced on his mind with reference to the degree of friendship subsisting between the writer and a third party.¹ In the other cases mentioned the fact in question is one which simply depends on the honesty of the witness, whereas he might, from the perusal of the documents, conscientiously draw a very different opinion or inference from that which would be drawn by a jury.

§ 463. The seventh and last class of cases in which secondary evidence of documents is admissible is in the examination of a witness on the *voire dire*, and in *preliminary* inquiries of the same nature. Owing to the modern improvements in the law as to the competency of witnesses, this rule has become practically inoperative; further discussion of it is therefore unnecessary.²

§ 464. We have now fully considered the general circumstances under which secondary evidence as to documents is admissible.³ We may therefore pass on to consider the circumstances under which *secondary evidence of oral testimony* will be received. The broad proposition as to this is, it will be recollected, that such proof is only admissible where the production of primary evidence is out of the party's power. Subject to this it may be stated, as a general rule, that where a witness has given oral testimony under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given will, if the witness himself be incapable of being called, be admitted in any subsequent suit between the same parties, or those claiming under them, if such suit relate to the same subject, or substantially involve the same material questions.⁴

§ 465. This rule is now recognized by all courts of justice.⁵

¹ Topham *v.* M'Gregor, 1844 (Rolfe, B.). See Taylor *v.* Carpenter, 1846 (Am.).

² See 1st edit. of this work, § 342; and cases cited in this edit., post, § 1393, last note.

³ See ante, § 428.

⁴ B. N. P. 239—243; Mayor of Doncaster *v.* Day, 1810; Strutt *v.* Bovingdon, 1803 (Ld. Ellenborough); R. *v.* Jolliffe, 1791 (Ld. Kenyon);

Pyke *v.* Crouch, 1696; Wright *v.* Doe *d.* Tatham, 1834; Glass *v.* Beach, 1833 (Am.); Lightner *v.* Wike, 1818 (Am.).

⁵ See Lawrence *v.* Maule, 1859 (Kindersley, V.-C.). The rule has been extended to affidavits: Dunne *v.* English, 1874. See, also, Parker *v.* M'Kenna, 1874, and Meyrick *v.* James, 1877.

However, to render secondary evidence of the 'testimony of a witness admissible, it must be proved that the witness was *duly sworn* in some judicial proceeding, to the authority of which the party, against whom his testimony is offered, was legally bound to submit, and in which he might have exercised the *right of cross-examination*. If this were not the rule, the preposterous consequence would follow, that secondary evidence of testimony might be received under circumstances that would exclude the testimony itself. Therefore, should it appear that depositions were taken, either by parties not legally authorised to take them,¹ or without the sanction of an oath or affirmation, or in the absence of the party against whom they are offered,² when, as in most criminal investigations,³ his presence was requisite, they cannot be received.⁴

§ 466. But although it is necessary that the party, against whom depositions are offered in evidence, should have had an opportunity of being present at the examination, and of cross-examining the witness,⁵ yet it is by no means requisite that he should have exercised that power. If, for example, notice has been given to him of the time and place of an examination on commission, and he neither intimates a wish to cross-examine, nor applies to the court to enlarge the time for that purpose, it will be presumed that he has acted advisedly, and the depositions will be received.⁶

§ 467.⁷ The admissibility of this secondary proof of oral testimony seems to turn rather on the right to cross-examine than upon the precise identity, either (if the opponent be substantially the same) of the parties or of the points in issue, in the two

¹ 12 Vin. Ab. Ev. A. b. 31; B. N. P. 241.

² The admissibility of depositions taken before a coroner, in the absence of the accused, will be discussed hereafter. See post, § 494.

³ See post, § 479.

⁴ In *R. v. Eriswell*, 1790 (Ld. Kenyon).

⁵ *Att.-Gen. v. Davison*, 1825. If, therefore, a commission be executed without any notice, or without a sufficient notice (*Fitzgerald v. Fitzgerald*, 1863), being given to the opposite party, to enable him, if he pleases, to put cross-interrogatories, the depositions will be rejected:

Steinkeller v. Newton, 1840.

⁶ In *Cazenove v. Vaughan*, 1813, the examinations taken under the order were held to be admissible in evidence, although the defendant had received no notice of the time and place of taking them: *McCombie v. Anton*, 1843, where a defendant, after joining plaintiff in obtaining a commission to examine witnesses upon interrogatories, gave notice that he declined to proceed with the examination, upon which plaintiff sent him word that he should apply for a commission *ex parte*, and had done so, and obtained one.

⁷ Gr. Ev. § 164, in part.

proceedings.¹ Consequently, the evidence taken on the first trial is admissible on a second trial if, although the two trials be not between the same parties, the second trial is between those who represent the former parties, and claim through them by some title acquired subsequently to the first trial; ² if in a dispute respecting lands any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies, though the last suit relate to other lands; ³ and, in criminal cases, a deposition taken on a charge either of assault and robbery, or of stabbing, or of doing grievous bodily harm, can, after the death of the witness, be read upon a trial for murder, where the two charges relate to the same transaction; ⁴ for, if this were not the law, the depositions of the deceased would, in many cases of homicide, be most improperly excluded.⁵ Thus, where a prisoner, who had been summarily convicted of an assault, was, in consequence of the death of the party struck, subsequently indicted for murder, the convicting magistrate was permitted to state what the deceased had sworn in the prisoner's presence, the examination not having been reduced into writing; ⁶ on another indictment for murder, a deposition of the deceased taken on a prior charge of larceny against the accused was read.⁷

§ 468. If, however, the point in issue, though very similar, was so far different in the two proceedings, that the witness, who was called to prove or disprove the issue in the former, need not have been *fully* cross-examined in regard to the matters in controversy in the latter, his deposition, if tendered on the second trial, will be excluded. On this ground a deposition taken on a charge of

¹ *Wright v. Doe d. Tatham*, 1834, where the evidence of a witness who had testified in a suit, wherein A. and several others were plaintiffs and B. defendant, was, after his death, held admissible in a subsequent action relating to the same matter, brought by B. against A. alone.

² *Com. Dig. Ev. A. 5*, explained by Littledale, J., in *Doe v. Derby*, 1834; *Doe v. Powell*, 1852.

³ *Doe v. Foster*, 1834 (Alderson, B.); *Llanover v. Homfray*, 1880.

⁴ *R. v. Smith*, 1817; *R. v. Lee*, 1864 (Pollock, C.B.); *R. v. Dilmore*,

1852 (Wightman, J.); *R. v. Beeston*, 1855; *R. v. Williams*, 1871.

⁵ 2 Stark. R. 212 (1817), note by the reporter.

⁶ *R. v. Edmunds*, 1833 (Tindal, C.J.). The learned judge appears, however, to have received the evidence, not as proving the facts stated, but as producing an answer from the prisoner.

⁷ *R. v. Buckley*, 1873 (Lush, J.). This, however, was allowed not as any evidence of the facts deposed, but simply as affording a motive for revenge on the part of the prisoner.

assault was afterwards rejected on an indictment for wounding ;¹ again,² in America, where the issue in one action had been upon a common or free fishery, and that in another action was upon a several fishery, evidence of what a witness, since deceased, had sworn upon the former trial, has been held inadmissible.³

§ 469. In stating that this rule mainly depends on the opportunity given for cross-examination, it must however be carefully noted that though a party may have had the right of cross-examining a witness, he will be liable to have the statement of that witness adduced against him in a subsequent action, only in the event of *his opponent being substantially the same in both suits*.⁴ For, unless this be the case, the adversary in the second suit has had no power to offer evidence in his own favour.⁵

§ 470. In a civil case, R. S. C., 1883, Ord. XXXVII. r. 25, provides “all evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the *same cause or matter*.”

§ 471. Subject to the above rule, secondary evidence of oral testimony cannot (as has already been stated) be received. An attempt made some years ago in equity to engraft an exception on this rule—and to say that whenever depositions have been taken not strictly in the same matter, but against a party in one suit, who is also a party to a second suit, wherein substantially the same questions arise, such depositions are as against him admissible in the second suit without any proof that the witnesses are dead, or for other good reasons incapable of being examined⁶—entirely failed.⁷

§§ 472-8. The common law (apart from the rule above cited)

¹ R. v. Ledbetter, 1850, commented upon, however, in R. v. Beeston, 1855.

² Gr. Ev. § 164.

³ Melvin v. Whiting, 1828 (Am.); Jackson v. Winchester, 1800 (Am.).

⁴ Morgan v. Nicholl, 1866.

⁵ Doe v. Derby, 1834.

⁶ As to what constitutes this, see next section.

⁷ Blagrove v. Blagrove, 1847. The cases of Nevil v. Johnson, 1703; Barton v. Palmes, 1704 (in both which cases it is not clear that

the witnesses were alive); Byrne v. Frere, 1828 (where the witnesses were clearly dead); and City of London v. Perkins, 1734 (where the decision of the House of Lords does not touch this point), and which were relied on for that purpose, do not, when carefully and critically examined, afford any authority for the contrary. See, also, Carrington v. Cornock, 1829; see, and compare, 3 Br. P. C. and 24 Lords' Journ. 248 (28th January, 1734).

regards a witness as incapable of being called,¹—1, When he is dead;² 2, When he is out of the jurisdiction of the court, or possibly, when he cannot be found after diligent inquiry;³

¹ In which case only is his evidence on oath in a prior suit between the same parties admissible: *supra*, § 464.

² *Pyke v. Crouch*, 1696. The court, however,—unless some account of the death of a witness be given, or at least some evidence be furnished showing that proper inquiries have been made, and that no tidings can be heard of him,—will not presume his death, so as to admit his deposition, though taken as much as fifty years before: *Benson v. Olive*, 1732. See *ante*, § 297.

³ This is clear where it is proved that the witness is actually residing in some place *beyond the jurisdiction* of the court: *Fry v. Wood*, 1731. But questions sometimes arise respecting the amount and nature of the proof required to establish this fact. Thus, if a witness has been examined on interrogatories by consent, on account of expected absence, it is not absolutely necessary that he should be on his voyage when the trial comes on. If the ship has sailed, though it has put back, or if the witness has gone on board, and was ready to sail, though prevented by contrary winds, that is sufficient: *Fonsick v. Agar*, 1807 (Sir James Mansfield). But see *Carruthers v. Graham*, 1841, cited *post*, § 517. For instance, secondary evidence was admitted where the witness had sailed for Spain, had been driven back by stress of weather, and six days before the trial was at Falmouth, expecting to sail again immediately: *Ward v. Wells*, 1809. See *Varicas v. French*, 1849. But where it was only sworn that the witness was a seafaring man, and some six months before the trial had belonged to a ship lying in the Thames, this evidence was rejected as too vague, though possibly admissible, if it could be further shown that any efforts had been recently made to find him: *Falconer v. Hanson*, 1808 (Ld. Ellenborough). This case suggests the propriety of noticing an old decision of

the time of James the First (Godb. 386), in which it was expressly laid down that, if a party *cannot find* a witness, then he is, as it were, dead to him; and his depositions in a cause betwixt the same parties may be read, provided the party make oath that he endeavoured to find him, but could neither see him nor hear of him. In no modern case has precisely the same point been ruled; but as it has frequently been held that proof of inability to find an attesting witness will let in evidence of his handwriting (*Kay v. Brookman*, 1828; *Cunliffe v. Sefton*, 1802; *Crosby v. Percy*, 1808; *Ld. Falmouth v. Roberts*, 1842; *Parker v. Hoskins*, 1810; *Burt v. Walker*, 1821; *Spooner v. Payne*, 1847), these analogous decisions would seem in some degree to support the correctness of the old authority, at least so far as relates to civil causes.

A similar latitude is not allowable in criminal proceedings, and the deposition of a witness, whether taken before a magistrate or a coroner, will not be rendered admissible, on mere proof that the witness himself cannot be found after diligent search: *Ld. Morley's case*, 1666 (all the Judges); *R. v. Scaife*, 1851. Neither will it be received, though satisfactory proof be given that the witness was not absent from any intention to defeat justice, but that, being a foreigner, he had, since the prisoner was committed for trial, returned to his own country, and was at the time of the trial resident abroad: *R. v. Austen*, 1856; *R. v. Hagan*, 1837. These cases overrule the law as laid down in *B. N. P.* 242. This kind of evidence has also been rejected in America, both where the witness could not be found within the jurisdiction, but was reported to have gone to an adjoining state (*Wilbur v. Selden*, 1826 (Am.)), and where he was proved to have left the state, after being summoned to attend at the trial: *Finn's case*, 1827 (Am.).

3, When he is either insane, or seriously sick;¹ and 4, When it is proved to the satisfaction of the court that he is

How far *answers to inquiries* respecting the witness are admissible to prove that he cannot be found, is not very clearly defined. That such answers will be rejected as hearsay, if tendered in proof of the fact that the witness is abroad, is beyond all doubt (*Robinson v. Markis*, 1841 (Ld. Abinger); *Doe v. Powell*, 1836); but where the question is simply whether a diligent and unsuccessful search has been made for the witness, it would seem, both on principle and authority, that the answers should be received as forming a prominent part of the very point to be ascertained: *Wyatt v. Bateman*, 1836 (Coleridge, J.); *Burt v. Walker*, 1821; *Austin v. Rumsey*, 1849 (Erle, J.). In order to show that inquiries have been duly made at the house of the witness, his declarations as to where he lived cannot be received (*Doe v. Powell*, 1832); neither will his statement in the deposition itself, that he is about to go abroad, render it unnecessary to prove that he has put his purpose in execution: *Proctor v. Lainson*, 1836 (Ld. Abinger).

¹ If he be proved at the trial to be *insane*, the witness's deposition will be admissible (as to depositions taken by committing justices, see post, § 479A), in like manner as if he were dead (*R. v. Eriswell*, 1790 (Ashhurst, J., and Ld. Kenyon)); and the same rule is stated to prevail, though the insanity be only of a temporary character: *R. v. Marshall*, 1841 (Ludlow, S., after consulting Coltman, J.). This, however, appears to be carrying the doctrine beyond its legitimate extent; for since the casual illness of a witness will not—as shown below—warrant the reading of his former testimony, at least in a civil suit, but will only furnish good ground for moving to postpone the trial, the same rule should surely prevail in the event of a witness being afflicted with temporary madness. No sensible distinction can be drawn between the two cases. Where depositions are tendered on the ground of

the witness being insane, it may sometimes be advisable to show that his intellect was sound at the time of his previous examination; and if such examination were had but a short time before the trial this course may even be necessary: *R. v. Wall*, 1830 (Park, J.).

It is somewhat difficult to discover from the authorities what *degree of illness* must be proved in order to let in depositions: *R. v. Bull*, 1871. See R. S. C. 1883, Ord. XXXVII. r. 18, cited post, § 506. In an old case, where a witness on his journey to the place of trial was taken so ill as to be unable to proceed, his deposition was allowed to be read (*Luttrell v. Reynell*, 1677); but too much weight must not be given to this decision, since, if the course there adopted were ordinarily allowed, there would be very sudden indispositions and recoveries: *Harrison v. Blades*, 1813 (Ld. Ellenborough); *Jones v. Brewer*, 1811 (Heath, J.). The rule laid down by Lord Ellenborough, that where a witness is taken ill, the party requiring his testimony should move to *put off the trial*, is certainly less open to objection and abuse: *Harrison v. Blades*, 1813. In the criminal courts this practice has long prevailed, and it has there been expressly decided, that the depositions of a woman who was so near her confinement as to be unable to attend a trial could not be received: *R. v. Savage*, 1831 (Patteson, J.); see post, § 481. If, however, from the nature of the illness or other infirmity no reasonable hope remains that the witness will be able to appear in court on any future occasion, his deposition is certainly admissible in criminal (11 & 12 V. c. 42 ("The Indictable Offences Act, 1848"), § 17, cited post, § 479; *R. v. Hogg*, 1833 (Gurney, B.); *R. v. Edmunds*, 1833 (Tindal, C.J.); *R. v. Wilshaw*, 1841; *R. v. Cockburn*, 1857), as it is in civil, proceedings (*Jones v. Jones*, 1785; *Andrews v. Palmer*, 1812; *Fry v. Wood*, 1731; *Corbett v. Corbett*, 1813). The case of *Doe v. Evans*,

kept out of the way by the contrivance of the opposite party.¹

§ 479. The Legislature has moreover also expressly provided that, in certain cases, certain depositions should, under particular circumstances, be received in evidence.²

§ 479A. Depositions taken in criminal cases in pursuance of "The Indictable Offences Act, 1848,"³ are made secondary evidence if the witness be (1) dead, (2) so ill as to be unable to travel. The Act in question provides, "That in all cases, where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence, whether committed in England or Wales, or upon the high sea, or on land beyond the sea, or whether such person appear voluntarily, upon summons, or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, *in the presence of such accused person*, who shall be at liberty to put

1827, where Vaughan, J., is said to have rejected the depositions of a witness, who was bedridden, and nearly a century old, and quite unable to attend the trial, is obviously not law. Where, upon an issue being directed out of the old Court of Chancery, it appeared that a witness, who had been examined in the cause as to the handwriting of certain documents, had since become *blind*, the court made an order that his depositions should be read at the trial: *Lynn v. Robertson*, 1823.

¹ The proposition that, if a witness be *kept out of the way* by the adversary, his former statements on oath will be admissible, rests partly on the authority of several decisions both in the civil and criminal courts (*Ld. Morley's case*, 1666 (all the Judges); *R. v. Harrison*, 1692 (*Ld. Holt*); *Green v. Gatewick*, 1673; *R. v. Scaife*, 1851; *R. v. Guttridge*, 1840. See, also, *Egan v. Larkin*, 1842 (*Ir.*) (*Brady, C.B.*)); partly on the analogies furnished by one or two statutes (see 50 G. 3, c. 102, § 5 (*Ir.*); 56 G. 3, c. 87, § 3 (*Ir.*),

noticed post, § 497); but chiefly on the broad principle of justice, which will not permit a party to take advantage of his own wrong. In a case where three prisoners were indicted for felony, and a witness for the prosecution was proved to be absent through the procurement of one of them, the court held that his deposition might be read in evidence as against the man who had kept out of the way, but that it could not be received against the other two men: *R. v. Scaife*, 1851.

² See, as to depositions in criminal cases, *supra*, § 479A; as to depositions in bankruptcy cases, *infra*, § 496; and as to certain special cases, *infra*, § 497 (as to Ireland), and § 499 (as to India and the Colonies); and as to those in ordinary civil cases taken on commission, *infra*, § 505; and as to those filed in answer to interrogatories, §§ 521 et seq. For another and special instance, see "The Fugitive Offenders Act, 1881" (44 & 45 V. c. 69), § 29, cited post, § 1562.

³ 11 & 12 V. c. 42, § 17.

questions to any witness produced against him, take the statement¹ on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be *read over* to and *signed* respectively by the *witnesses* who shall have been so examined, and shall be *signed* also by the *justice* or justices taking the same; and the justice or justices, before whom any such witness shall appear to be examined as aforesaid, shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if, upon the trial of the person so accused as first aforesaid, it shall be proved, by the oath or affirmation of any credible witness, that any person whose depositions shall have been taken as aforesaid, is *dead*, or *so ill as not to be able to travel*, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity² of cross-examining the witness, then, if such deposition *purport* to be *signed* by the *justice* by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same."

§ 480. Although the above enactment only renders his deposition admissible if the witness be "dead, or so ill as not to be able to travel," the maxim, "*expressio unius est exclusio alterius*," has

¹ The form given in Sched. M to the Act is as follows:—

Depositions of Witnesses.

"To Wit,—The examination of C. D., of [Farmer], and E. F., of [Labourer], taken on [oath] this _____ day of _____, in the year of our Lord _____ at _____, in the [county] aforesaid, before the undersigned, [one] of Her Majesty's justices of the peace for the said [county], in the presence and hearing of A. B.; who is charged this day before [me], for that he the said A. B. on _____ at _____ [&c., describing the offence as in a warrant of commitment]. This deponent C. D. on his [oath] saith as follows [&c., stating the deposition of the witness as nearly as possible in the words he uses. When his deposition is complete, let him sign it].

And this deponent E. F. upon his oath saith as follows [&c.].

The above depositions of C. D. and E. F. were taken and [sworn] before me at _____ on the day and year first above mentioned. T. S."

² This fact may be negated by proof that the accused was insane when the deposition was taken, or was otherwise incapacitated by illness from cross-examining the deponent: *R. v. Peacock*, 1870 (*Brett and Mellor, JJ.*).

no application, and it does not abrogate the common-law rule,¹ that if a witness be fraudulently or forcibly kept out of the way by the prisoner himself, his deposition ought to be received.² Whether the courts will go one step further, and admit the deposition of a witness, who, although not too ill to travel,³ may be proved to be permanently insane,⁴ remains to be seen; but such a decision seems naturally to follow from the former ruling.

§ 481. Some judges consider (though this is not clear) that the statute does abolish, however, the old common-law rule⁵ that a prosecutor ought to apply for a postponement of the trial, where a material witness is only suffering under a *temporary* indisposition. Accordingly, such judges have, under the statute, admitted the deposition of a woman who, when the trial took place, had just been confined.⁶ But other judges think that a confinement (which after all is but a natural state) is not "illness" within the meaning of that word or the statute.⁷

§ 482. The statute, too, apparently authorises the reading of the deposition on its being merely proved that the witness is dead, or too ill to travel; that he was examined in the presence of the accused, who had a full opportunity of cross-examining him; and that the document purports to be signed, either by the committing justice, or, at least, by the justice "by or before whom the same purports to have taken place."⁸ Possibly, however, it is also

¹ Ante, note ³ to §§ 472-8.

² R. v. Scaife, 1851.

³ When a witness is able to travel without risk, her old age and nervousness and inability to stand a cross-examination will not justify the reading of her deposition: R. v. Farrell, 1874; R. v. Thompson, 1876 (Lush, J.).

⁴ Ante, note ³ to §§ 472-8. In R. v. Cockburn, 1857, the deposition of a witness was received, on his doctor proving that, though he might have been brought to the court without danger to life, he was suffering from paralysis, which disabled him altogether from giving evidence. See, also, R. v. Wilson, 1861.

⁵ Ante, note ³ to §§ 472-8.

⁶ Thus in R. v. Stephenson, 1862, and R. v. Harvey, 1850, the court admitted the deposition of a woman, who was daily expecting her confinement, and was "otherwise poorly."

See, too, R. v. Croucher, 1862; R. v. Wilson, 1874; R. v. Heesom, 1878 (Lush, J.); and R. v. Goodfellow, 1879 (Bowen, J.); R. v. Wellings, 1878. In these last three cases the woman was daily expecting her confinement.

⁷ R. v. Wilton, 1858 (Willes, J.); R. v. Walker, 1859 (id. with concurrence of Crowder, J.); R. v. Parker and Ashworth, York Summer Assizes, 1862 (Mellor, J., saying that the general opinion of the bench was with him); R. v. Omant, 1854. And at all events from R. v. Tait, 1861 (Crompton, J.), and other cases in this note, it appears that the judge, notwithstanding the Act, has a discretionary power of postponing the trial (which some judges habitually exercise), instead of allowing the deposition to be read.

⁸ In R. v. Vidil, 1861, Blackburn, J., held the deposition of a sick witness admissible, though it had been

C. IV.] DEPOSITIONS TAKEN BY JUSTICES, HOW PROVED.

necessary for the prosecutor to further prove all or some of the following facts, viz., that the deposition was taken before the accused was committed or bailed; that it was taken on oath or affirmation; that it was read over to the witness, and that it was signed by him. For it may be contended that the section set out above enumerates all these circumstances as apparently necessary ingredients in a valid deposition; and then, in the paragraph relative to the proof, speaks, first, of "the person, whose deposition *shall have been taken as aforesaid*," being dead, &c., and next, of "*such*¹ deposition" purporting to be signed by the justice, while in the form of deposition provided the justice merely states that the witness was examined on oath, and in the presence of the accused, and such form is wholly silent as to whether or not the examination was read over to the witness, or was signed by him.

§ 483. It is submitted that while "*omnia præsumuntur rite esse acta*," a deposition will be rendered inadmissible if the prisoner can show affirmatively that the signature, purporting to be that of the justice, is a forgery, or even that the deposition was not taken upon oath, or that it was not read over to the witness, or that the signature purporting to be that of the witness was not made by him, or that the witness had refused or omitted to sign the statement.

§ 484. A few words as to the *proper course of taking depositions* under the Act, so as to render them admissible in evidence, will probably prove useful here. To render depositions admissible, it is apparently necessary that the accused should, when they were taken, have been charged with some indictable offence; that the statement of each witness should have been made under the sanction of an oath or affirmation, administered by the magistrate before whom the charge is preferred;² that such oath or affirmation should have been administered in the presence of the accused; that the statement should have been made entirely in his presence,³

taken before two magistrates who acted only on that occasion, and the prisoner had been charged before and committed by another magistrate. Sed qu.

¹ As to the meaning of the word "*such*," see *Ld. Brougham in Case-ment v. Fulton*, 1845, P. C.

² See *R. v. Vidil*, 1861, cited ante, § 482, n. ⁸.

³ The same doctrine prevailed at common law. See *R. v. Errington*, 1838; *R. v. Woodcock*, 1789; *R. v. Dingler*, 1791; *R. v. Paine*, 1695; cited with approbation (*Ld. Kenyon*) in *R. v. Eriswell*, 1790.

and that he should have had full opportunity for cross-examination ; that the whole of the statement elicited either by examination or by cross-examination, and not merely so much of the evidence as the justice might consider *material*,¹ should have been reduced to writing in the first person, and in the very words of the witness ;² that the deposition, when completed, should have been read over to the witness, and signed by him, as a token of his assenting to its correctness ;³ that the whole body of the depositions, if not each deposition,⁴ should also be signed by the justice ; and that they should have been transmitted by him,—together with the written information, the statement of the accused, and the recognizance of bail, if any such documents should exist,—to the proper officer of the court in which the trial is to be had, before or at the opening of such court.⁵

§ 485. The Legislature, in directing the magistrate to take down the statements of the witnesses as nearly as possible in their own words, and not merely “so much thereof as shall be material,” of course did not intend the depositions to be loaded with every idle word let fall by the persons under examination, and with expressions obviously having no reference to the charge against the accused. But it certainly meant to fetter the discretion of the justices, who, under the old law, were apt to reject as immaterial much valuable information. For facts which on a preliminary inquiry appear to be of trifling importance, turn out often to be extremely relevant ; and where all the evidence is not given, the court, the prosecutor, and the prisoner, are alike kept in the dark, and much time may be wasted in endeavours to throw discredit upon the testimony of witnesses, by showing that they have made statements at the trial which are not to be found in the depositions returned.⁶ If a person of weak intellect, or a child, be examined before the justice, it is also desirable that the questions and

¹ This was the old law. See 7 G. 4, c. 64, §§ 2 and 3 (“The Criminal Law Act, 1826”).

² See Sched. M. cited ante, § 479A, n. 1.

³ See *R. v. Plummer*, 1844 ; *R. v. Flemming*, 1799.

⁴ See § 487, post.

⁵ See §§ 17 and 20 of 11 & 12 V. c. 42 (“The Indictable Offences Act, 1848”).

⁶ *R. v. Potter*, 1829 ; *R. v. Thomas*, 1837 ; *R. v. Grady*, 1836 ; *R. v. Smith*, 1845 ; *R. v. Weller*, 1846.

answers touching his capacity to take an oath, should appear on the face of the deposition.¹

§ 486. Whether a deposition originally written down in the absence of the prisoner could be received in evidence under the Act, on proof being given that it had afterwards been read over in his presence to the witness, who had then assented on oath to its contents, is very problematical. Although depositions, thus laxly taken, have more than once been admitted under the old law,² this course of proceeding has frequently been condemned by judges as highly unjust;³ and, indeed, it is obvious that it affords no fair opportunity to the accused of cross-examining the deponent. On one occasion, Platt, B., rejected a deposition expressly upon this ground, remarking that a prisoner could not have "a full opportunity of cross-examining the witness," within the meaning of the statute, unless the deposition was taken down in his presence, and in the presence of the magistrate, and unless he was warned by the magistrate at the close of the examination that he might put any questions he liked to the witness, with reference to the statement which had been made.⁴ It also is extremely doubtful whether a deposition can be read in a case where the prisoner has abstained from asking any questions in consequence of the witness being too ill to bear further examination.⁵

§ 487. As to the mode in which depositions should be entitled, one caption at the head of the whole body of depositions will suffice,⁶ if, indeed, it be necessary, in strict law,⁷ to have a caption at all;⁸ and no objection can be sustained on the ground that the title does not state with sufficient precision the charge against the accused.⁹ Although each witness must sign his own deposition, it will be sufficient for the magistrate to attach his signature, once for all, at the end of the whole body of depositions, provided that all

¹ *R. v. Painter*, 1846 (Wilde, C.J.).

² *R. v. Smith*, 1817; *R. v. Calvert*, 1848; *R. v. Walsh*, 1850. See *R. v. Christopher*, 1849.

³ *R. v. Johnson*, 1846 (Platt, B.); *R. v. Forbes*, 1814 (Chambre, J.); *R. v. Kiddy*, 1824; *R. v. Calvert*, 1786 (Rolfe, B.); *R. v. Walsh*, 1850; *R. v. Beeston*, 1854 (Alderson, B.). See, also, *R. v. Crowther*, 1786.

⁴ *R. v. Day*, 1852. See *R. v. Bates*, 1860; *R. v. Watts*, 1864.

⁵ *R. v. Hyde*, 1848.

⁶ *R. v. Johnson*, 1847 (Alderson B.).

⁷ See, however, *R. v. Newton*, 1859; and *R. v. Galvin*, 1865 (Ir.), where the point almost equally divided the Irish judges.

⁸ *R. v. Langbridge*, 1849.

⁹ *Id.*

of them be written either on one sheet of paper,¹ or on different sheets connected with each other.² Still, if the depositions be copied on separate sheets, and no proof be given of their having been pinned, or otherwise fastened together, at or before the time when the last was signed,³ those bearing no signature will be rejected.⁴ The signature of the justice must seemingly appear on the face of the deposition to be that of the magistrate “by, or before, whom the same purports to have been taken,” and no parol evidence can supply any omission on this head.⁵ Depositions, when admissible under the Act, may be read in evidence before the grand jury as well as at the actual trial.⁶

§ 488. It is no longer necessary (as formerly) to verify the signature of the magistrate taking the deposition, but proof must be adduced “that the deposition was taken in the presence of the accused, and that he, or his counsel or attorney, had a full opportunity of cross-examining the witness.” Either the justice, clerk, or at least some person who was present during the whole inquiry,⁷ must be forthcoming, to show that the requirements of the law have been duly complied with. When a deposition is sought to be read on the ground of the sickness of the witness, it must, of course, be further proved that he is at the actual time of the trial too ill to travel. The judges require this fact to be strictly established.⁸ Mere proof that the witness was confined to his bed some days before will not suffice;⁹ and, as a general rule, it will be prudent,¹⁰ though it is not absolutely necessary,¹¹ to have the testimony of a medical man.

§ 489. As already mentioned,¹² a deposition will be admissible under the Act, though taken upon a charge technically different

¹ *R. v. Young*, 1850; *R. v. Osborne*, 1837 (Coleridge, J., and *Ld. Abinger*).

² *R. v. Parker*, 1870; overruling *R. v. Richards*, 1866. See, also, *R. v. Carrol*, 1869 (Hannen, J.).

³ See *R. v. Lee*, 1864 (Pollock, C.B.).

⁴ *R. v. France*, 1839 (Alderson and Parke, BB.).

⁵ *R. v. Miller*, 1850 (Maule, J.).

⁶ *E. v. Clements*, 1851.

⁷ See *R. v. Wilshaw*, 1841; *R. v. Wilson*, 1874.

⁸ See *R. v. Harris*, 1850; *R. v. Ulner*, 1850; *R. v. Riley*, 1851. See, also, *R. v. Day*, 1852.

⁹ *R. v. Riley*, 1851; *R. v. Williams*, 1865 (Pigott, B.).

¹⁰ *R. v. Riley*, 1851; *R. v. Welton*, 1862 (Byles, J.); *R. v. Williams*, 1865 (Pigott, B.).

¹¹ *R. v. Stephenson*, 1862; *R. v. Croucher*, 1862 (Bramwell, B.).

¹² *Ante*, § 467.

from that in respect of which the accused is afterwards indicted, provided that on the former inquiry a full opportunity of cross-examination has been afforded to him. For instance, the deposition of a deceased person, taken on a charge against the prisoner of having stabbed him, or done him some grievous bodily harm, can be read on a subsequent trial for his murder or manslaughter.¹

§ 490. In addition to the regulations considered above,² an Act of 1867³ contains two important enactments on this subject. The first⁴ provides in substance that every person, who is charged before a justice with an indictable offence, shall be asked whether he desires to call any witnesses; and, if he does so, the justice in his presence shall examine such witnesses on oath, and reduce their statements to writing. The depositions thus taken shall then be read over to the witnesses and signed by them, and shall also be countersigned by the justice, and “transmitted in due course of law;” and, afterwards, upon the trial, all the laws relating to the depositions of witnesses for the prosecution shall apply to these depositions.

§ 491. The other enactment,⁵ after reciting the provisions of the Indictable Offences Act, 1848, which have been already set out, further recites that it is permitted under certain circumstances to read in evidence on the trial of an accused person the deposition, taken in accordance with the provisions of the said Act, of a witness. “It may happen that a person dangerously ill, and unable to travel, may be able to give material and important information relating to an indictable offence, or to a person accused thereof,” and “it may not be practicable or permissible to take, in accordance with the provisions of the said Act, the examination or deposition of the person so being ill, so as to make the same available as evidence in the event of his or her death before the trial of the accused person, and it is desirable in the interests of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event

¹ *R. v. Beeston*, 1854; *R. v. Dilmore*, 1852 (Wightman, J.); *R. v. Lee*, 1864 (Pollock, C.B.); *R. v. Williams*, 1871. See *R. v. Clarke*, 1859.

² Under § 17 of 11 & 12 V.

c. 42 (“The Indictable Offences Act, 1848”).

³ 30 & 31 V. c. 35.

⁴ § 3 of 30 & 31 V. c. 35.

⁵ 30 & 31 V. c. 35, § 6.

of the death of the person giving the same : therefore, whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and in the opinion of some registered medical practitioner not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said Act of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof, and, if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same with the said addition to the proper officer of the court for trial at which such accused person shall have been so committed or bailed ; and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough in which he shall have taken the same, who is hereby required to preserve the same, and file it of record ; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give evidence, it shall be lawful to read such statement in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice¹ of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, if he had chosen to be present,

¹ This must be in writing : *R. v. Shurmer*, 1886 (C. C. R.).

full opportunity of cross-examining the deceased person who made the same."¹

§ 492. The depositions of witnesses examined before the *coroner* as to a murder or manslaughter are probably admissible as secondary evidence² if certified and subscribed by such coroner with the recognizances, if they and also the inquisition taken before him, are delivered to the proper officer of the court in which the trial is to be, before or at the opening of the court.

§ 493. Assuming that the above provisions as to coroners' depositions are still in force,³ they differ materially from those which regulate the mode of taking depositions before justices, and of proving them when taken. In the first place, the coroner is only required to put in writing "so much of the evidence as shall be material;" secondly, the narrative may be drawn up in the third person; thirdly, the witness is not required to sign the document, though he usually does so for the purpose of identifying it;⁴ fourthly, the deposition must, it would seem, be proved, either by calling the coroner who subscribed it, or by proving his signature thereto, and showing by his clerk, or by some person who was present at the inquiry, that the requirements of the law were duly complied with.⁵

§ 494. It was at one time *said* that a striking distinction existed between depositions returned by justices and those taken by coroners, inasmuch as while (as we have seen) depositions taken before justices, to be admissible as secondary evidence against the prisoner, must have been taken in his presence, depositions taken before coroners might be received, though taken in a prisoner's absence. This doctrine, however, has not only been questioned by

¹ A cross-examination stopped in consequence of the witness's illness will not suffice: *R. v. Mitchell*, 1892. § 7 enacts, that "whenever a prisoner in actual custody shall have served, or shall have received, notice of an intention to take such statement as hereinbefore mentioned, the judge or justice of the peace by whom the prisoner was committed, or the visiting justices of the prison in which he is confined, may, by an order in writing, direct the gaoler having the

custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement; and such gaoler shall convey the prisoner accordingly * * *

² By 7 G. 4, c. 54, § 4, extended to Ireland by 9 G. 4, c. 54, § 4.

³ Possibly they are repealed by § 34 of 11 & 12 V. c. 42, as to which, however, see *R. v. Cleary*, 1862.

⁴ See *R. v. Flemming*, 1799.

⁵ See *R. v. Wilshaw*, 1841.

such modern text writers of eminence as Starkie,¹ Phillpotts,² and Russell;³ but Montague Smith, J.,⁴ has declined to act upon it, and the doctrine will probably be discredited by all the judges whenever it formally comes before the Court of Criminal Appeal.⁵

§ 495. Two other statutes make depositions taken either under the English Bankruptcy Act, 1883,⁶ or the Irish Bankrupt and Insolvent Act, 1857,⁷ admissible in evidence. The English Act provides⁸ that, “in case of the *death*⁹ of the debtor or his wife, or of a witness whose evidence has been received by any court in any proceeding under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a *copy* thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to.” The Irish Act provides¹⁰ that, in the event of the *death* of any witness deposing to the petitioning creditor’s debt, trading, or act of bankruptcy, under any bankruptcy heretofore or hereafter, or under any petition for arrangement, his deposition, purporting to be sealed with the seal of the Court of Bankruptcy, or a *copy* thereof purporting to be so sealed, shall in all cases be received as evidence of the matters therein respectively contained.

§§ 496—498. In Ireland,¹¹ if any person, after giving information or examination upon oath against any person for any offence, shall, before the trial, be murdered or violently put to death, or so maimed, or forcibly carried away and secreted, as not to be able to give evidence on the trial, his information or examination shall be admitted in all courts of justice in Ireland as evidence on the trial;

¹ 2 St. Ev. 384—386.

² 2 Ph. Ev. 74, 75.

³ 2 Russ. C. & M. 892, 893.

⁴ In *R. v. Rigg*, 1866.

⁵ See *R. v. Wall*, 1830. The doctrine that depositions taken before a coroner in a man’s absence are evidence against him apparently rests on two or three decisions *temp.* Charles II. (*Ld. Morley’s case*, 1666 (all the Judges in H. L.); *Bromwich’s case*, 1666; *Thatcher v. Waller*, 1675; *R. v. Harrison*, 1692), when the rules of evidence were only partially understood, and appear to be capable of a far more limited interpretation;—on

dicta thrown out by *Ld. Kenyon* and *Buller, J.*, in *R. v. Eriswell*, 1790;—on a note of a case said to have been decided by *Hotham, B.* (*R. v. Purefoy*, 1794);—and on a ruling by *Coleridge, J.*, *Sills v. Brown*, 1840.

⁶ 46 & 47 V. c. 52.

⁷ 20 & 21 V. c. 60, Ir.

⁸ 46 & 47 V. c. 52, § 136.

⁹ The answers of a bankrupt are not—at least, during his life—made evidence in proceedings in the bankruptcy against persons other than himself: *Brunner, In re*, 1887.

¹⁰ 20 & 21 V. c. 60, § 365, Ir.

¹¹ By 50 G. 3, c. 102, § 5.

provided¹ that the information or examination of a witness secreted shall not be evidence, unless it shall be found on a collateral issue, to be put to the *jury* trying the prisoner, that he was secreted by the person on trial, or by some person acting for him, or in his favour. By a subsequent Irish statute² informations, or examinations, under similar circumstances, are rendered, after similar proof, receivable in evidence before the grand jury.

§ 499. The original common law rule which required that, to constitute them evidence, the examinations of witnesses should be taken *vivâ voce* in the presence of both a jury, and of, in a criminal case, the accused, and in a civil case both parties, has in modern times been much broken in upon by sundry Acts of Parliament and rules made by statutory authority.

§ 500. Evidence may be given about matters which have taken place in India or the English Colonies, or elsewhere, and have become the subject of criminal or civil proceedings in England, if such evidence be taken in accordance with certain statutory provisions which are mentioned in the footnote.³

¹ This is a remarkable proviso, since it differs from the ordinary rule of law on the subject, which is stated ante, § 23.

² 56 G. 3, c. 87, § 3.

³ The principal of such provisions is "The East India Company's Act, 1772" (13 G. 3, c. 63, amended by "The Statute Law Revision Act, 1888," of 51 V. c. 3, and further amended by "The Statute Law Revision Act, 1892," of 55 & 56 V. c. 19), made applicable (see *Wilson v. Wilson*, 1883, C. A.) to the Indian High Courts by 24 & 25 V. c. 104 ("The Indian High Courts Act, 1861"), §§ 10, 11. § 40 of the original Act relates to criminal proceedings in the Queen's Bench for offences committed in India, and gives power to the Queen's Bench to issue warrants to the Indian Courts in such proceedings in the Queen's Bench; and if under this section the Attorney-General move for a rule to order the Indian Courts to take evidence, his statement that this is necessary will be sufficient without any affidavit. See *R. v. Douglas*, 1824; and also *R. v. Douglas*, 1846. The

provisions of this section were re-enacted by 24 G. 3, c. 25 ("The East India Company's Act, 1784"), § 78, and in 26 G. 3, c. 57 ("The East India Company's Act, 1786"), § 28. §§ 42 and 45 of the same Act relate to proceedings in Parliament touching offences committed in India, and give the Lord Chancellor or Speaker (as the case may be) power to issue warrants to the Indian Courts to take the necessary evidence. § 44 of the Act relates to actions in the High Court in England for causes of action which arose in India, and gives such High Court in England power to issue warrants to the Indian Courts to take the necessary evidence. As to the construction of the Act generally, and in particular of the expression "cause of action," see *Francisco v. Gilmore*, 1797; *Savage v. Binney*, 1834; and *Kelsall v. Marshall*, 1856.

The Queen's Bench Division in England is authorized to try any person employed in the public service abroad, who, in the exercise or under colour of such employment, shall have committed any offence,

§ 500A. It will be noticed that none of the statutes above referred to require the party to prove that the witnesses whose depositions he seeks to use are beyond the jurisdiction of the court at the time of the trial. Perhaps, however, principle requires that some slight evidence of this kind shall be given, and this view derives confirmation from Ord. XXXVII. r. 18.¹

§ 501. In *criminal* proceedings a resort to the provisions of the Acts mentioned in the footnote to § 500 may even now become sometimes necessary.

§ 501A. In civil cases, however, the statutes mentioned in the footnote have been rendered practically obsolete by the provisions contained in R. S. C. Ord. XXXVII.^{1a}

§ 502. The examination of witnesses taken *de bene esse* on commission may also be contained in depositions which may be read at the trial if such depositions were taken under an order for that purpose, which may generally be obtained where a witness is over seventy years of age,² or is dangerously ill, or is about to go abroad,³ and the inability of the witness to attend the trial is proved.⁴

§ 503. The High Court, moreover, has a general power⁵ to order the examination of witnesses in any cause or matter to be taken by depositions on commission wherever it "shall appear necessary for the purposes of justice."

by 42 G. 3, c. 85. The evidence on such trial may (by § 3 of the above statute, and also by § 81 of 24 G. 3, c. 25) be taken upon commission. See, as to postponement of a trial under the enactment above mentioned, *R. v. Jones*, 1806.

The provisions of § 40 of "The East India Company's Act, 1772" (*supra*), are extended to the trials in the Queen's Bench Division of offences against "The Slave Trade Acts" by 6 & 7 V. c. 98, § 4 ("The Slave Trade Act, 1843"). Their provisions as to taking evidence by commission are also extended to all Colonies, and to all actions (not being actions at the suit of the Crown: see *R. v. Wood*, 1841) in whatever country the cause of action may have arisen, by 1 W. 4, c. 22.

The High Court of Justice in Ireland is given powers similar to those possessed by the High Court of Justice in England, by 3 & 4 V. c. 22 ("The Debtors (Ireland) Act, 1840.") As to the powers of the Scotch Courts, see 29 & 30 V. c. 112.

¹ See post, § 504.

^{1a} Post, § 504.

² This rule, however, does not entitle the party to an order for the examination of a very large number of witnesses: *Bidder v. Bridges*, 1884, C. A., which consult generally as to examination of old witnesses *de bene esse*.

³ *Bellamy v. Jones*, 1802.

⁴ Post, § 504; Ord. XXXVII. r. 18.

⁵ Under Ord. XXXVII. r. 5, set out in full, post, § 504.

§ 504. Under whichever of the powers mentioned above evidence by depositions may have been taken, questions as to the admissibility of such depositions may arise in connection with the law of evidence; therefore, although it would be quite foreign to this work to give any detailed instructions as to the practice¹ to be followed in obtaining an order to take evidence on commission, it may be useful to set out a large portion of R. S. C. of 1883, Ord. XXXVII., which practically collects in a code the powers of the High Court upon this subject. The material parts of such Order appear to be as follow:—

“Ord. XXXVII. Examination of witnesses.

5. The court or a judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order² for the examination upon oath before the court or judge or any officer of the court, or *any other person* and *at any place*, of any witness or person,³ and may empower any party to any such cause or matter to give such deposition in evidence therein *on such terms*,⁴ if any, as the court or a judge may direct.⁵

* * * * *

6A. If in any case the court or a judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission. See R. S. C. Ord. XXXVII. r. 6a (R. S. C., October, 1884, r. 6). The Appendix to the Rules of 1884 contains (in forms 1 and 2) the forms of such order and request, which may be cited as forms 37A and 37B in Appendix.

8. Any person wilfully disobeying any order requiring his attendance for the purpose of being examined or producing any

¹ This will be found in any good book on Practice, e.g., the Annual Practice for 1895, at pp. 727 et seq.

² The forms of “Order for Examination of Witnesses before Trial” are given in R. S. C. 1883, App. K. Nos. 36 and 37. An order under this rule may be made *ex parte*, but only at the peril of the applicant: *Bidder v. Bridges*, *supra*.

³ See also r. 1 of same Order, cited post, § 1395.

⁴ See r. 18, post, § 504.

⁵ An order under this rule can only be made where it is sought to examine witnesses. Under it the English Court has no jurisdiction to

order the production of documents. *Cape Copper Co. v. Comptoir d'Escompte*, 1890, C. A. But *quære* whether letters of request, or any matter within the jurisdiction may not be added to the commission. See *Mason and Barry v. Comptoir d'Escompte*, 1890. Moreover, when no action is pending against him, and it is not necessary for the carrying out of an order already made, there is no jurisdiction under this rule to make an order against a person not a party to any pending action. See *Elder v. Carter*, 1890, C. A.

“document shall be deemed guilty of contempt of court, and may be dealt with accordingly.

9. Any person required to attend for the purpose of being examined or of producing any document, shall be entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court.

10. Where any witness or person is ordered to be examined before any officer of the court, or before any person appointed for the purpose, the person taking the examination shall be furnished by the party on whose application the order was made with a copy of the writ and pleadings, if any, or with a copy of the documents necessary to inform the person taking the examination of the questions at issue between the parties.

11. The examination shall take place in the presence of the parties, their counsel, solicitors, or agents,¹ and the witnesses shall be subject to cross-examination and re-examination.

12. The depositions taken before an officer of the court, or before any other person appointed to take the examination, shall be taken down in writing by or in the presence of the examiner, not ordinarily by question and answer, but so as to represent as nearly as may be the statement of the witness, and when completed shall be read over to the witness and signed by him in the presence of the parties, *or such of them as may think fit to attend*. If the witness shall refuse to sign the depositions, the examiner shall sign the same. The examiner may put down any particular question or answer if there should appear any special reason for doing so, and may put any question to the witness as to the meaning of any answer, or as to any matter arising in the course of the examination. Any questions which may be objected to shall be taken down by the examiner in the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question.

* * * * *

16. When the examination of any witness before any examiner shall have been concluded, the original depositions, authenticated

¹ How if they do not think fit to attend? See r. 12.

“by the signature of the examiner, shall be transmitted by him to the Central Office, and there filed.

17. The person taking the examination of a witness under these Rules may, and if need be shall, make a special report to the court touching such examination and the conduct or absence of any witness or other person thereon,¹ and the court or a judge may direct such proceedings and make such order as upon the report they or he may think just.¹

18. Except where by this Order otherwise provided, or directed by the court or a judge, no deposition shall be given in evidence at the hearing or trial of the cause or matter *without the consent* of the party against whom the same may be offered, *unless* the court or judge is satisfied that the deponent is *dead*, or *beyond the jurisdiction* of the court, or *unable from sickness* or other *infirmity* to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence, saving all just exceptions, without proof of the signature to such certificate.

* * * *

20. Any * * * * party or witness, having made an affidavit to be used or which shall be used on any proceeding in the cause or matter, shall be bound, on being served with such subpoena, to attend before such officer or person for cross-examination.

21. Evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial.

22. The practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial, shall extend and be applicable to evidence taken in any cause or matter at any stage.

23. The practice of the court with respect to evidence at a trial, when applied to evidence to be taken before an officer of the court or other person in any cause or matter after the hearing or trial,

¹ See r. 5, ante. It seems that the examiner may order any witness to be examined apart from the others, even though he be the agent or soli-

citor of one of the parties: *In re West of Canada Oil Lands and Works Co.*, 1877 (Jessel, M.R.).

“shall be subject to any special directions which may be given in any case.

24. No affidavit or deposition filed or made *before issue joined* in any cause or matter shall, without special leave of the court or a judge, be received at the hearing or trial thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the court or a judge, notice in writing shall have been given by the party intending to use the same to the opposite party of his intention in that behalf.

25. All evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter.”

§§ 505—6. It is incumbent on the judges to exercise extreme caution before making any order of an unusual character under either rule, unless such order be obviously necessary for the purposes of justice.¹ An arbitration under the Companies Acts is a “cause or matter” falling within them.²

§§ 507—10. The “officers of the court” mentioned in Rule 5 are barristers of at least three years’ standing,³ appointed by the Lord Chancellor for five years, and removable by him.⁴ They are called “Examiners of the Supreme Court.” All the examinations ordered in the Chancery Division *must* be referred to them in rotation, unless the court or a judge otherwise directs⁵; and they *may* take the examinations in any cause or matter depending either in the Queen’s Bench or in the Probate, Divorce, and Admiralty Divisions, if the court or a judge so directs.⁶ The examinations, unless the court or a judge entrusts the inquiry to one particular examiner,⁷ are distributed by the principal clerk to the registrars of the Chancery Division among the whole body, “according to regular and just rotation, and in such manner as to keep secret from all persons the rota or succession.”⁸ They are to give appointments in writing, specifying the place and time, not more

¹ Central News Co. v. East. News Tel. Co., 1884, C. A.

² In re Mysore, &c. Co., 1889.

³ R. S. O. made 4 Feb. 1884, Ord. XXXVII. r. 40.

⁴ Id.

⁵ Id. r. 39.

⁶ Id.

⁷ Id. r. 49.

⁸ Id. rr. 41, 42.

than seven days in advance, "at which, subject to any application of the parties, the examination shall be taken;"¹ they are to regard the convenience of the witnesses, and all the circumstances of the case;² and, subject to such adjournment as they shall think reasonable or just, they are to proceed *de die in diem*;³ they may, with like consent, examine persons not named in the order.⁴

§ 511. The Form⁵ given by the R. S. C. 1883 for a commission to examine witnesses contains a clause requiring the commissioners to be sworn. Decided cases⁶ show that commissions may be granted to examine witnesses resident in countries beyond the dominion of the British Crown. A commission containing such a clause, but appointing a single commissioner, should also authorize him to administer the oath to himself.⁷

§ 512. To render the depositions taken under a commission available, the evidence must be such, in substance, as would be received according to the English law. If at the trial it appears, either on the face of the depositions, or by extrinsic proof, that the commissioners have, after due objection taken,⁸ admitted illegal, or rejected legal, evidence, the judge will in his discretion suppress the depositions either wholly or in part.⁹ The examiner's certificate must be taken up. If it be not, its effect may not be stated to the court.¹⁰

§ 513. The commissioners must, moreover, have substantially followed the instructions given by the instrument appointing them. The court, however, will not look out critically for objections to their conduct, but will rather in their favour presume that they have discharged their duty.¹¹ Thus, though a commission that after the examinations had been taken, *the same* should be transmitted to this country, is not satisfied by sending mere copies of them;¹² where commissioners were directed to reduce the examina-

¹ *Id.* r. 44.

² *Id.* r. 45.

³ *Id.*

⁴ *Id.* r. 46.

⁵ See F. 13, par. 8, App. J.

⁶ *Fischer v. Sztaray*, 1858; *Duckett v. Williams*, 1851.

⁷ *Wilson v. De Coulon*, 1883.

⁸ *Robinson v. Davies*, 1879.

⁹ *Lumley v. Gye*, 1854.

¹⁰ *Stuart v. Balkis Co.*, 1883.

¹¹ *Atkins v. Palmer*, 1821 (*Abbott, C.J.*); *Greville v. Stulz*, 1847 (*Ld. Denman*); *Hitchins v. Hitchins*, 1866; *Grill v. Gen. Iron Screw Collier Co.*, 1866; *Hodges v. Cobb*, 1867.

¹² *Clay v. Stephenson*, 1837.

tions into writing in the English language, and to swear an interpreter to translate the oath, interrogatories, and depositions, the commission was held to be well executed by the return of depositions, which had originally been taken down in the foreign language, and translated by the interpreter into English six weeks afterwards;¹ and when a commission contained a direction that the witnesses should be examined apart from each other, the court presumed that the commissioners had complied with this order, although their return was silent on the subject.² Possibly, however, the court would not feel justified in presuming that commissioners had taken the oaths prescribed to them before acting.³ When documents have been produced in evidence before the commissioners, it will now suffice to transmit with the depositions, either the originals or certified copies or extracts; and attention is drawn to this rule, because a more stringent one used to prevail.⁴

§ 514. When a commission to take evidence has been directed to a court, it is of course desirable that the court should have been rightly named; but a slight error in the description, provided it be not of such a nature as to render it really doubtful what tribunal was intended to have been addressed, will not invalidate a commission.⁵

§§ 515—516. With regard to reading at the trial depositions which have been taken under any of the various provisions mentioned above, reference must be made to the terms of Rule 18 of Order XXXVII., which has been already set out in full.⁶ The effect of this rule is, that depositions taken under the above rules are in general admissible only in one or other of four events. First, if the opposite party *consents*; secondly, if the witness be proved to be *dead*; thirdly, if he be shown to be *beyond the jurisdiction* of the court;⁷ and, lastly, if it appear that, from *sickness* or *infirmity*,—

¹ *Atkins v. Palmer*, 1821; *R. v. Douglas*, 1846.

² *Simms v. Henderson*, 1848.

³ *Brydges v. Branfill*, 1841.

⁴ *R. v. Douglas*, 1846.

⁵ *Wilson v. Wilson*, 1883.

⁶ *Supra*, § 504, at p. 345.

⁷ By Scotch law, the deposition of a witness *residing* abroad examined

under a commission may be read without proving at the trial that he is then absent; the onus of showing that he is within the jurisdiction rests on the objecting party: *Sutton v. Ainslie*, 1852. The same doctrine was adopted by Sir C. Cresswell in the Matrimonial Court: *Pollack v. Pollack*, 1861; and *Mills v. Mills*, 1861.

which terms do not necessarily mean an *incurable* malady, but will be satisfied by any grave illness,¹—he cannot attend the trial. By Rule 5,² indeed, none of these conditions are absolutely binding, for the judge has power to order depositions to be given in evidence in any case. Still, that power must be guided by a judicial discretion.³ The admissibility in evidence of depositions will still, in the absence of *consent*, depend (as it formerly did) upon whether the witness at the trial⁴ is or is not able. Indeed, in the case of *affidavits*, it is expressly provided⁵ that “where it appears to the court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and *that such witness can be produced*, an order shall *not* be made authorizing the evidence of such witness to be given by affidavit.”⁶

§ 517. The question remains, how the incapacity of the witness to attend the trial is to be proved. The evidence as to such incapacity being exclusively addressed to the judge, *affidavits* are probably admissible upon the point as well as ordinary *vivâ voce* testimony.⁷ The R. S. C. 1883, make no reference to the matter, while the only two forms which allude to it do so in language inconsistent and obscure. The Form of Order for a commission to examine witnesses contains a clause that the depositions may be given in evidence, “without any other proof of the *absence from this country* of the witness or witnesses therein named, than an affidavit of the solicitor or agent of the said as to his belief of the .” This, so far as it goes, is clear, but it deals simply with the case of the witness being out of the jurisdiction of the court. The form given for an order for examining witnesses before an examiner, contains a direction that the depositions of

¹ D. of Beaufort v. Crawshay, 1866.

² Cited ante, § 504.

³ See Warner v. Mosses (C.A.), 1880 (Jessel, M. R.); Bidder v. Bridges, 1884.

⁴ See Bagot v. Bagot (Ir.), 1878.

⁵ By R. S. C. Ord. XXXVII. r. 1.

⁶ See Nadin v. Bassett, 1883, C. A.

⁷ On one occasion Pollock, C.B., received the affidavit of a *medical man*, as sufficient proof of the sickness of a deponent to let in his deposition: Knight v. Campbell, 1848.

The point was again raised and left undecided in the case of the D. of Beaufort v. Crawshay, 1866. There, Willes, J., who seemed inclined to support the ruling of the Chief Baron, referred to R. v. Ryle, 1841, but that case, on careful examination, will be found to throw a most treacherous light on the subject, as it relates to a mere *ex parte* proceeding. See, also, Carruthers v. Graham, 1841 (Ld. Denman); Robinson v. Markis, 1841 (Ld. Abinger); and ante, §§ 473, 475.

any witness may be given in evidence on the trial of the cause, "without any further proof of the *absence* of the said witness than the affidavit of the solicitor or agent of the as to his belief." Here the term "absence" has a more indefinite signification than in the former form, and it is suggested that it may be interpreted as including an absence from the court in consequence of death or illness, as well as an absence from the country.

§ 518. All the provisions of the special Acts cited in a footnote on a previous page¹ relating to the examination of witnesses under commissions and orders have been extended to all suits and proceedings on the Revenue side of the Queen's Bench Division, and also made applicable to the Probate and Divorce Division in England,² and to the corresponding courts in Ireland.³

§ 519. The Court of Bankruptcy is empowered⁴ to "order that any person, who in England would be liable to be brought before it," with the view of discovering the debtor's property, "shall be examined in Scotland or Ireland, or in any other place out of England"; and it is also provided⁵ that "subject to general rules, the court may in any matter take the whole or any part of the evidence either *vivâ voce*, or by interrogatories, or upon affidavit, or by *commission abroad*." By General Rule 66, the court may empower any party to any matter, "where it shall appear necessary for the purposes of justice," to give depositions in evidence on such terms as the court may direct; and by r. 60, "an order for a commission to examine witnesses, and the writ of commission shall follow the forms for the time being in use in the High Court, with such variations as circumstances may require."

§ 520. The County Court rules on the subject of taking evidence by deposition will be found in Ord. XVIII. of the Rules of 1889, rr. 14—28, which are substantially identical with the provisions of R. S. C., Ord. XXXVII. rr. 5—25, which have been already set out.⁶ It is also provided⁷ that "affidavits and depositions shall be read as the evidence of the person *by whom they are used*."

¹ See footnote to § 500, *supra*.

² See Rules in Div. and Mat. Causes, rr. 132—137, 198.

³ See, also, on this subject, *Brown v. Brown*, 1869; the Rules of March, 1874, for the Ct. of Prob. in Eng., rr. 116—123, and Form 31; and the

Rules of 1865 for the Ct. of Div. and Mat. Causes, rr. 129—137, Form 20.

⁴ By 46 & 47 V. c. 52 ("The Bankruptcy Act, 1883"), § 27, subs. 5.

⁵ *Id.* § 105, subs. 5.

⁶ *Supra*, § 504.

⁷ C. C. Ord. XVIII. r. 13.

§ 521. It has been already incidentally mentioned that evidence other than oral (in other words secondary) is sometimes obtained by means of interrogatories, and the depositions in answer to them. Between the years 1854 and 1875 many rules were framed either by the Legislature or the judges, with the view of enabling litigants, before the actual trial took place, to scrape the consciences of their opponents by means of interrogatories.¹ The law on the subject is now embodied in R. S. C., 1883, Ord. XXXI.

§ 522. Any discussion as to *when* interrogatories may be administered, or as to the practice with regard to them, would appear to be out of place here. Moreover, full information on the subject will be found in any book upon "Practice." In this edition of the present work² it will therefore not be further discussed.

§ 523. The question whether any and what use can be made at the trial of the answers to interrogatories which have been given by the other side may properly be considered a branch of the Law of Evidence. As to this, the R.R. S. C., 1883, provide, by Ord. XXXI. r. 24, as follows:—"Any party may, at the trial of an action or cause, matter, or issue, use in evidence any one or more of the answers, or any part of an answer, of the opposite party to interrogatories without putting in the others, or the whole of such answer: Provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in."

§§ 524—542. It has been remarked, "Under the new rules the plaintiff can read one passage without referring to the whole, even of the same paragraph, and I think no judge would allow a defendant, where he had made an admission, to read with it a passage which was not connected in sense or substance with that

¹ 17 & 18 V. c. 125, §§ 51—57; 38 & 39 V. c. 77, Ord. XXXI. For corresponding provisions relative to Ireland, see 19 & 20 V. c. 102, §§ 56—59 and 62; 40 & 41 V. c. 77 (Ir.) and Rules. Similar powers were also extended to the old Court of Admi-

ralty, whether for England (see 24 & 25 V. c. 10, § 17, repealed by 44 & 45 V. c. 59), or for Ireland: see 30 & 31 Vict. c. 114, § 41, Ir.

² The eighth edition (1885) of this work discussed the subject at great length.

admission, even if he had put in a statement submitting that he was entitled to do so, and claiming to do so. Of course, when an admission is read, everything ought to be read which is fairly connected with that admission, but I think it would be wrong for the defendant, and he would not be allowed, to try to bring in matter which was not in any way connected with the matter admitted.”¹

§ 543. Before courts of law were empowered to issue commissions for themselves, it was often necessary to institute proceedings in Chancery as auxiliary to an action at law; and in such cases, recourse was had to what was called “an action for perpetuating testimony.”

§ 544. To extend the benefits derivable from this mode of proceeding, two Acts were passed. The first of these was passed in 1842,² and is now repealed. Its provisions are, however, substantially embodied in the R. S. C., 1883, Ord. XXXVII. r. 35,³ which provides, that “any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate⁴ or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing such right or claim.” By the Legitimacy Declaration Act, 1858,⁵ which is the second of the Acts just referred to (and is still in force), the Divorce Division of the High Court, on the petition of certain persons specially interested, may make decrees declaratory of the legitimacy or illegitimacy of any such petitioner, or of the validity or invalidity of the marriage of his parents, or grandparents, or of his own marriage, or of his right to be deemed a natural-born subject.

§ 545. An action to perpetuate testimony must have “been commenced for the purpose,” or no witness will be allowed to be examined.⁶ The court may, on motion in such an action, if the

¹ Cotton, L.J., in *Lyell v. Kennedy*, 1884; and see *Bowen, L.J.*

² 5 & 6 V. c. 69, repealed by 46 & 47 V. c. 49.

³ Proceedings under this rule should be jealously watched: *Camp-*

bell v. E. of Dalhousie, 1869, H. L.

⁴ See *Re Stoer*, 1884, C. A.

⁵ 21 & 22 V. c. 93, §§ 1, 2; extended to Ireland by 31 & 32 V. c. 20, Ir.

⁶ Ord. XXXVII. r. 37.

defendant makes default in delivering a defence, make an order for the action to proceed in due course, and that (where this is advisable) a witness be at once examined, as if the pleadings were closed.¹ The witnesses will be examined orally before one of the examiners of the court under Ord. XXXVII. r. 5.² The depositions will then be taken down, signed, authenticated, and transmitted to the Central Office, as in other cases.³ No relief being prayed, the action must not be set down for trial.⁴ In general, the depositions will not be received at a subsequent trial as evidence,⁵ except in support of an action, nor then, unless it be proved that the witnesses are dead, or otherwise incapable of attending to be examined.⁶ The practice of the ecclesiastical courts was similar.⁷

§ 546. If a witness, besides being examined on interrogatories, should testify at the subsequent trial of a cause, either party, on any further trial respecting the same subject, may, if the witness be then incapable of attending, rely, at his option, either on the deposition, or on the previous *vivâ voce* testimony.⁸ What such witness⁹ orally testified may be proved, either by any person, who will swear from his own memory,¹⁰ or by notes taken at the time by any person, who will swear to their accuracy,¹¹ or possibly from the necessity of the case, by the judge's notes.¹² This last mode of proof, however, is open to very grave, if not insuperable, objections, as such notes form no part of the record, nor is it the duty of the judge to take them, nor have they the sanction of his oath to their accuracy or completeness.¹³ How far it may be necessary to prove the *precise words* spoken, does not clearly appear. It is

¹ Marquess of Bute *v.* James, 1886; and see *Ellice v. Roupell*, 1863.

² Marquess of Bute *v.* James, *supra*. See, also, *Litton v. Murphy*, 1878 (Ir.), decided on the corresponding Irish Order, Ord. XXXVI. r. 6.

³ Ord. XXXVII. rr. 12, 16.

⁴ Ord. XXXVII. r. 38.

⁵ Where the Crown has an interest, if the Att.-Gen. be made defendant, then no objection can be taken to the depositions on the ground that the Crown was not a party to the action: Ord. XXXVII. r. 36.

⁶ 1 Smith's Ch. Pr. 769; Morrison *v.* Arnold, 1817. See Att.-Gen. *v.*

Ray, 1843.

⁷ Wequelin *v.* Wequelin, 1839.

⁸ *Tod v. E. of Winchelsea*, 1828 (Ld. Tenterden), ante, § 400.

⁹ Gr. Ev. § 166, in part.

¹⁰ *Strutt v. Bovington*, 1803 (Ld. Ellenborough); *May. of Doncaster v. Day*, 1810; *R. v. Jolliffe*, 1791 (Ld. Kenyon).

¹¹ *May. of Doncaster v. Day*, 1810.

¹² *Id.* (Sir J. Mansfield).

¹³ *Conradi v. Conradi*, 1868 (Wilde, J.O.); *Miles v. O'Hara*, 1811 (Am.); *Foster v. Shaw*, 1821 (Am.); *Ex parte Learmouth*, 1821.

said that in one case the evidence of a witness was rejected "as he could not undertake to give the words, but merely to swear to the effect of them."¹ The same precision has, on several occasions, been deemed requisite in America.² On the other hand, it has been forcibly urged³ that to insist upon strict accuracy, in effect excludes this sort of evidence altogether, while extreme particularity and minuteness in a witness's narrative, and an undertaking by him to repeat with exactness every word of the deceased's testimony, ought to excite just doubts of the witness's honesty, and the truth of his evidence.⁴

§ 547. It has been, on the one hand, decided that a dying deposition is not admissible unless the very words of the deceased were taken down, both question and answer having been taken down where questions were put.⁵ On the other hand, on indictments for perjury, it is not necessary to state the entire examination, but it will suffice to narrate, with accuracy, the whole of that portion of the evidence which relates to the point on which the perjury is assigned, provided the witness can further swear that he heard the whole examination, and that nothing was subsequently said to qualify the original statement.⁶ Unless he can do this, his evidence cannot be received;⁷ and as the same rule ought to apply to the proof of the testimony of a deceased witness, it would follow that the person who heard a deceased witness give his evidence must at all events be able to positively state what was said on the examination in chief, and must also be able to give the substance of his answers in cross-examination, or to positively swear that nothing escaped the witness, which could vary or qualify the first statement.⁸

§ 548. When depositions are tendered in evidence as secondary proof of oral testimony, they are, of course, open to all the objections which might have been raised had the witness himself been personally present at the trial. Leading and other illegal questions are therefore constantly suppressed, together with the answers to

¹ Mentioned by Lord Kenyon in *R. v. Jolliffe*, 1791.

² *U. S. v. Wood*, 1818 (Am.); *Foster v. Shaw*, 1821 (Am.); *Wilbur v. Selden*, 1826 (Am.); *Com. v. Richards*, 1836 (Am.).

³ *Gr. Ev.* § 165.

⁴ See *Cornell v. Green*, 1823 (Am.);

Miles v. O'Hara, 1811 (Am.); *Caton v. Lenox*, 1827 (Am.); *Jackson v. Bailey*, 1806 (Am.).

⁵ *R. v. Mitchell*, 1892.

⁶ *R. v. Rowley*, 1825; *R. v. Dowlin*, 1792.

⁷ *R. v. Jones*, 1791.

⁸ *Wolf v. Wyeth*, 1824 (Am.).

them; and this, too, whether the testimony has been taken *viva voce* or by written interrogatories.¹ But a party cannot repudiate an answer which has been given to an illegal question put on his own side;² and in all cases where objections are taken to interrogatories on the ground of their being couched in a leading form, the judge is vested with a wide discretion as to how much, if any, of the depositions returned he will in consequence strike out.³ Where a witness, on being examined upon interrogatories in a foreign country, stated in one of his answers the contents of a letter which was not produced, *that part* of the deposition was suppressed at the trial, though it was urged, that as the witness was beyond the jurisdiction of the court, no means existed for compelling the production of the letter.⁴ Said Chief Justice Tindal,⁵ "We have no power to compel the witness to give any evidence at all: but if he does give an answer, that answer must be taken in relation to the rules of our law on the subject of evidence."

§ 549. In another case, under similar circumstances, where a witness described the contents of a letter and of the reply to it, but produced neither, on this deposition being tendered the court at the trial rejected the answers which stated what the letters contained, but admitted so much of the deposition as stated that the witness had written a letter to the party in question; for had the witness been himself present in court he might have been examined thus far, in order to prove that the defendants through him had used some exertion to procure the party's answer.⁶ Again, depositions have been admitted, though the witness on his examination had refreshed his memory with some papers, which he alleged were partly in his handwriting and partly not, but which he refused to allow the commissioners to see upon the ground that they were private memoranda; for, as it was a matter for the discretion of the commissioners whether they would permit the witness to refer to

¹ *Hutchinson v. Bernard*, 1836.

² *Id.*

³ *Small v. Nairne*, 1849.

⁴ *Steinkeller v. Newton*, 1838 (Tindal, C.J.). In *Wheeler v. Atkins*, 1805, *Ld. Ellenborough* is reported to have held, under similar circum-

stances, that either the letter must be produced, or the *whole* interrogatory abandoned. But this case is clearly not law. See per *Ld. Denman*, in *Small v. Nairne*, 1849.

⁵ In *Steinkeller v. Newton*, 1838.

⁶ *Tufton v. Whitmore*, 1840.

papers during his examination, the learned judge, at the trial, presumed that they had exercised their discretion with propriety.¹

§ 549A. The rules governing the production of depositions as evidence have now been fully discussed.

§ 550. It remains to consider a third head of the subject of secondary evidence, viz., the general principle that the law recognises no *degrees* in the various kinds of secondary evidence.² This rule applies whether the original evidence be itself oral or documentary. For instance, if a deed be lost, or in the hands of the adversary, who after due notice refuses to produce it, secondary evidence of its contents may at once be given by parol testimony, even though the party offering such evidence may be proved to have in his possession a counterpart, a copy, or an abstract of the document;³ and the former testimony of a deceased witness may be proved by any person who heard him examined, even where a clerk or a shorthand writer took down his evidence word for word.⁴

§ 551. At the same time, the rule that there are no degrees of secondary evidence simply applies to the *admissibility* of secondary evidence, and not to the degree of *weight* to which different sorts of secondary evidence are entitled; it does not mean that the mere memory of a witness, who has read a deed, is entitled to equal weight with an authenticated copy of the same instrument. In many cases a jury would properly regard evidence with distrust if it appeared that more satisfactory proof was intentionally withheld, and under some circumstances this distrust might even amount to absolute incredulity.

§ 552. Cases in which the law has expressly substituted some particular species of secondary evidence, in the place of primary proof, are, however, *excluded from the operation of the rule* that there are no degrees of secondary evidence. For instance, examined copies, and, in some cases, office or certified copies of public records

¹ *Steinkeller v. Newton*, 1838 (Tindal, C.J.).

² *Doe v. Ross*, 1840; *Hall v. Ball*, 1841; *Brown v. Woodman*, 1834 (Parke, B.); *Jeans v. Wheedon*, 1843 (Cresswell, J.).

³ Cases in last note; also, *Sugden v. Ld. St. Leonards*, 1876; *Brown v. Brown*, 1858; *In re Brown*, 1858;

and *In re Gardner*, 1858, in which cases oral evidence of the contents of a lost *will* was admitted. See *Johnson v. Lyford*, 1868; also, ante, § 436.

⁴ *Jeans v. Wheedon*, 1843 (Cresswell, J.). See *R. v. Christopher*, 1849.

and documents are, on grounds of general convenience, considered admissible,¹ and, though in strictness secondary evidence, partake so much of the character of primary proof, that so long as it is possible to produce them, other inferior degrees of secondary evidence cannot be received.² Parol testimony, in such cases, can only be admitted on proof, first, that the public record or document has itself been lost or destroyed (for otherwise a copy might be obtained), and, secondly, that any copy which may have been taken, is no longer under the control of the party relying upon less satisfactory evidence.³ In like manner, if a witness has been examined before a magistrate or coroner under such circumstances, that these officers respectively have, in pursuance of their duty, taken down his statement in writing, parol evidence of his examination cannot be given in the event of his death, so long as the deposition itself can be produced, since the law, having constituted the deposition as the authentic medium of proof, will not permit the admission of any inferior species of evidence. The mere statement of a witness who was present at the examination will be admissible if—and only if—it can be shown that the deposition is lost or destroyed, or is in the possession of the opposite party, who after notice refuses to produce it.⁴

§ 553. The principle, too, which includes every species of secondary proof in one legal category, by no means, however, opens a door to any sort of evidence, however loose, which a party chooses to tender.⁵ For example, the contents of a written instrument which is lost cannot be proved by means of a copy, until it be shown that such copy is accurate. If, as frequently happens, a party to the suit has himself made a copy of a letter which he has sent to his adversary, this copy, should the adversary, after notice to do so, refuse to produce the original letter, cannot be read in evidence, unless the party who made it can swear to its accuracy, or some other witness can be called who has compared it with the original.⁶ Neither can a document,—excepting in a very few cases by

¹ Ante, § 439, and post, §§ 1534, 1545, 1598 et seq.

² Doe v. Ross, 1840 (Ld. Abinger).

³ Thurston v. Slatford, 1700; Macdougall v. Young, 1826.

⁴ See 2 Russ. C. & M. 895; R. v.

Wylde, 1834.

⁵ Everingham v. Roundell, 1838 (Alderson, B.).

⁶ Fisher v. Samuda, 1808 (Ld. Ellenborough). But see Waldy v. Gray, 1875 (Bacon, V.-C.).

statutory authority,—be proved by the production of the copy of a copy.¹ Such evidence is rejected on the broad ground which renders hearsay evidence inadmissible, for assuming the second copy to correspond exactly with the first, the first must be produced and proved to have been compared with the original, or otherwise there would be nothing to show that the second copy and the original were identical. Such evidence would in fact be but the shadow of a shade.

§ 553A. We have now discussed in full the four great rules governing the production of testimony, which are: (i.) that the evidence must correspond with the issue—a rule which has necessitated as incidental to it the consideration of “variances” and of “amendments;”—(ii.) that the evidence must be confined to the point in issue; (iii.) that the burden of proof always lies upon the party who substantially asserts the affirmative—a rule as subsidiary to which the subjects of the “Right to Begin,” and “Right to Reply” have been necessarily considered—; and (iv.) that the best evidence must always be produced—the subjects of “Secondary Evidence” being rendered admissible, (1) as to documents, by means of “Notices to Produce,” &c., and (2) as to oral evidence by depositions, &c., having been treated of as arising out of, and in connection with, this fourth rule.

§ 553B. The general rules governing the production of testimony having been thus explained fully, we may now usefully pass on to the next part of our subject, which will be to consider the particular kinds of evidence.

¹ *Liebman v. Pooley*, 1816 (Ld. Ellenborough); *Everingham v. Roundell*, 1838.

AMERICAN NOTES.

Best Evidence.—It is extremely doubtful whether any rule so philosophical and general exists in the English law of evidence as that “the best evidence, of which the case in its nature is susceptible, should always be presented to the jury,” if by this is meant that other evidence is excluded. That it would be well as a rule of indulgence that evidence should be admitted in all cases if it is the best that the nature of the actual situation permits, for example, hearsay statements of a deceased person, is a position in favor of which much might be urged. But neither as a rule of requirement or of indulgence, does the rule exist that the best evidence of which the case is capable is to be given. It is quite possible to trace in the development of the law of evidence both the feeling, on the part of judges, that the best evidence must be given and that evidence should be received, if, *ex necessitate rei*, it is the best that can be offered. But neither policy has become established into a rule.

During the close of the sixteenth and for the major part of the seventeenth century, a formative period in the law of evidence, the effort was persistently made to determine all exclusions and admissions by this standard.

The earlier American cases, as might be expected, follow these stages of development of the “best evidence” rule in England by insisting on the rule in its wider scope.

So held that conviction of larceny could not be shown by parol to impeach a witness even if the court records had been destroyed by the burning of the court house, since it was the duty of the district attorney to send a certificate of the conviction to the Court of Exchequer, and that certificate was “higher and better proof.” *Hilts v. Colvin*, 14 Johns. 182 (1817). So where an exemplified copy of the judgment can be obtained, “neither the records themselves, nor minutes, should ever be received, when copies can be obtained, unless there is some strong reason for dispensing with the usual and appropriate evidence.” *Lowry v. Cady*, 4 Vt. 504 (1832). Such “strong reason” was considered to exist where the judgment was in 1783 “in a new and frontier County Court at the close of the revolutionary war, at a time and in a place where we may presume the records were made and kept in a slovenly manner.” *Walker v. Greenlee*, 3 Hawkes, 281 (1824). The birth of deceased cannot be proved by witnesses while the register of the birth is not accounted for. *Hartigan v. International, &c., Society*, 8 L. Can. Jur. 203 (1863). It will be observed that many of these cases bear on the *veraxa quaestio* of degrees in secondary evidence.

So the corollary of the “best evidence” rule—that the best

evidence which it is possible to offer will be received — has been laid down in broad terms. Thus the court of appeals of New York: "It is a universal rule, founded in necessity, that the best evidence of which the nature of the case admits is always receivable." *McKinnon v. Bliss*, 21 N. Y. 206 (1860).

It is not surprising that survivals are found, even in recent times.

On an indictment for larceny of a hog the son of the owner was not allowed to testify that his father had not consented to the taking. "The best evidence of non-consent was that of the owner himself; and before secondary evidence as to that fact was admissible a reason should have been shown satisfactorily accounting for the non-production of the best evidence." *Smith v. State*, 13 Tex. App. 507 (1883). But the later development of the law has rejected the "Best Evidence" rule in its sweeping form, both as a rule of indulgence and as one of requirement.

The strict rules of evidence are relaxed on the ground of impossibility of other proof than that excluded only in specified instances. For example, "The rule excluding hearsay evidence applies with full force notwithstanding no better evidence is to be found, and though it be certain, if the account is rejected, that no other can possibly be obtained." *Reeves v. State*, 7 Tex. App. 276 (1879).

Certainly there is at present no rule which requires, except in certain specified cases, that weaker evidence cannot be received where stronger is available. If a party, for any reason, presents a case of inherent weakness, either on account of the nature of the proof presented or because an unfavorable inference arises from the apparent suppression of better evidence, probably no rule of law is broken.

The official character of an individual may be shown by his openly acting in that capacity as well as by production of a commission or appointment. *U. S. v. Reyburn*, 6 Peters, 352, 367 (1832); *Bank v. Dandridge*, 12 Wheat. 64, 70 (1827).

A promissory note may be used to prove a fact, though it is contradicted by a recital in a deed. *Magee v. Burch*, 108 Mo. 336 (1891). Any person may state what the opposite party said on a previous occasion in court, though the evidence has been taken down by a stenographer, and no attempt is made to account for failure to produce his notes. *Brice v. Miller*, 35 S. C. 537 (1891).

The defence that certain machines sold do not comply with a warranty may be established by the results of certain tests made by the vendor; though the defendants have themselves made no attempts to put the machines into actual use. "It is obvious that the well-known rule of law to which the learned judge who tried the case called the attention of the jury has no just application to the case on trial. Its purpose is to require parties to deal

frankly with court and juries, to produce the best evidence in their possession or control at the time of the trial, and if it appears during the trial that the party has in his possession, or under his control, evidence which is better in quality than that which is produced, it is the duty of the court to direct the jury, in effect, to disregard the evidence produced, and to take into consideration the attempted fraud." Baker, D. J., in *U. S. Sugar Refinery v. E. P. Allis Co.* 56 Fed. Rep. 786 (1893). "The testimony of the chemist who has analyzed blood, and that of the observer who has merely recognized it, belong to the same legal grade of evidence; and though the one may be entitled to much greater weight than the other with the jury, the exclusion of either would be illegal." *People v. Gonzalez*, 35 N. Y. 49 (1866).

So a witness can testify even if better witnesses could have been produced. "One who can testify under any circumstances upon the facts on which he is examined, may do so as well where his superiors are to be found as where he knows as much as any other." *Elliott v. Van Buren*, 33 Mich. 49 (1875). In the same way, on an indictment for selling intoxicating liquor to a minor, the minor was allowed to testify to his minority, though better evidence, in the persons of his father and mother, was available, and an instruction to the effect that such evidence was not "the best evidence of which the case will admit" was held correctly refused. "It is perhaps true that the evidence of the minor may not be so satisfactory, as to the fact, as the evidence of the father or mother, or some other person present at his birth — still, his statement on oath as to his age, should be received and permitted to go to the jury as evidence, to have such weight as it is entitled to have, under the circumstances. . . . It is true, it is a rule of evidence, that, the best evidence of which the case, in its nature, is susceptible, should be required. But still, when there is no substitution of evidence, but only a selection of the weaker instead of the stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not infringed." *State v. Cain*, 9 W. Va. 559, 569 (1876). Where a document from the comptroller's office was produced, in the absence of the comptroller, by a witness to whom he had left the keys of his office, it was objected that the comptroller himself was the best evidence, and so that offered was inadmissible. Held: — unsound. "The rule that the best evidence in the party's power or possession shall be produced, does not apply in this case, for that rule only applies to grades of evidence. Oral evidence shall not be received when there is written, a copy when the original can be had." *Governor v. Roberts*, 2 Hawks, 26 (1822). The difficulties of applying the "best evidence" rule to the extent contended for are thus set out. "If the rule was, that the most full and satisfactory evidence should be produced, it would

follow that where it appeared there were others present, they should also be produced, or where a person from his situation had a better view of the transaction; one who had a less favourable position should not be received, or where it appears that another could give a more detailed account of the affair, one who could not give so full a one should be excluded, although there may be no doubt as to his knowledge of the facts to which he deposes." *Ibid.*

To prove the incarceration of a prisoner the sheriff who took him there is a competent witness, though the warden, keeping a record of the terms, &c., of prisoners, would be a better one. "If the marriage or birth of the prisoners had been wanted as introductory to evidence of the crime charged, it would scarcely be argued that a witness, who was present at the birth or marriage, was incompetent to prove it, because a registry existed. In questions of identity, records and registries are not the best evidence, for after the entries in them are received it is necessary to individuate the persons mentioned, and this must be done by evidence *dehors* the document." *Howser v. Com.* 51 Pa. St. 332 (1865). Evidence is admissible that a tumbler contained intoxicating liquor without producing the liquor or accounting for its absence. *Com. v. Welch*, 142 Mass. 473 (1886). The condition of clothes may be described though no reason is given for not producing them. To hold otherwise would require real evidence in all cases where it would be possible. *Com. v. Pope*, 103 Mass. 440 (1869). And yet it has been held that testimony was admissible that certain parts of a broken machine fitted each other, though the machine was present in court and could have been examined by the jury. *Congdon v. Howe Scale Co.*, 66 Vt. 255 (1894).

In proving what was done in buying and selling oil through agents at distant points under telegraphic orders, the principal is a competent witness, though better evidence could very probably be given by the agents who effected the transactions.

"In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had. The rule excludes only that evidence which itself indicates the existence of more original sources of information; but where there is no substitution of evidence, but only a selection of weaker instead of stronger proofs, or an omission to supply all the proofs capable of being produced, the rule is not impinged." *Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442 (1889); *Richardson v. Milburn*, 17 Md. 67 (1860). "It may be weaker than other evidence which might be attained, tending to prove the same fact; but the mere selection of weaker, instead of stronger proofs, will not justify the exclusion of the weaker,

when it is, in its nature, primary and relevant." *McCreary v. Turk*, 29 Ala. 244 (1856). To prove percolation, the plaintiff is not called upon to go to the expense of an uncertain experiment of ditching. *Crozer v. New Chester Water Co.*, 148 Pa. St. 130 (1892).

Where the making of certain statements is in issue as the basis of conduct, one who heard them may testify to them, although the party who made them might himself have been called as a witness. *Badger v. Story*, 16 N. H. 168 (1844); *Featherman v. Miller*, 45 Pa. St. 96 (1863). Or the statements are in writing. *State v. Seymore* (Ia.), 63 N. W. 661 (1895). The age of a person may be shown by witnesses, though there is a record of the birth in a family Bible. *State v. Woods*, 49 Kans. 237 (1892).

To the contrary effect, *i.e.*, that a witness with inferior knowledge cannot be called, while a better witness is available, see *Parliman v. Young*, 2 Dak. 175 (1879).

SUBSTITUTIONARY EVIDENCE. — There seems no doubt, however, that merely substitutionary evidence will be rejected, or, if received, will be so counterbalanced by the inference of fraud caused by the suppression of the superior evidence as to possess little, if any, resultant of probative force. This proceeds upon the line of thought embodied in the maxim, "*Omnia contra spoliatorem*," and has been considered in that connection. See *ante*, p. 183²⁵. There seems but slight practical advantage in formulating the "best evidence" rule to cover the same ground already covered by this presumption.

In *Holmes v. Coryell*, 58 Tex. 680 (1883) the court cite with approval an extract from 1 Greenl. Evid. 82. "This rule does not demand the greatest amount of evidence which can possibly be given of any fact; but its design is to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in the possession of the party. . . . In requiring the best evidence applicable to each particular fact, it is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had. The rule only excludes that evidence which itself indicates the existence of more original sources of information."

On the principle of *omnia contra spoliatorem*, the unfavorable inference which arises from failure to produce witnesses who know the entire facts, while putting forward those who know less, is both logically and legally obvious. As the court say on an indictment for keeping a gaming house, where several persons present at the time of the raid were in attendance at the trial and not called as witnesses, "Had there been any reply to be made to the inculpatory evidence produced by the state, it was clearly in the power of the accused to answer that evidence; and his failure to do so,

notwithstanding his ample opportunity, could well be considered by the jury as adding strength and force to the *prima facie* case made out by the state. He introduced other witnesses who did not know the material facts, but carefully avoided introducing those who did know them. 'Where a party being apprised of the evidence to be adduced against him has the means of explanation or refutation in his power if the charge or claim against him be unfounded, and does not explain or refute that evidence, the strongest presumption arises that the charge is true or the claim well-founded. It would be contrary to all experience of human nature and conduct to come to any other conclusion.' 1 Stark Evid. 545." *Stevenson v. State*, 83 Ga. 575 (1889).

"The jury may draw unfavorable inferences from a party's failure to call witnesses who have knowledge of material facts." *Wimer v. Smith*, 22 Oreg. 469 (1892).

"Any failure to do this could hardly happen without some motive, and in the absence of any other being shown, the almost irresistible conclusion would be that he feared at least the witness would not support his other testimony, and thus have the effect to create more or less doubt and discredit of such party's case." *Seward v. Garlin*, 33 Vt. 584 (1861); *Whitney v. Bayley*, 4 All. 173 (1862); *Baldwin v. Whitcomb*, 71 Mo. 651 (1880).

The modern objection to substitution lies in the bad faith to the tribunal implied in suppressing better evidence while offering an inferior quality, presumably less injurious to him who declines to produce the more conclusive. "For if it appear from the very nature of the transaction, that there is better evidence of the facts proposed to be proved, which is withheld, a presumption arises that the party has some secret and sinister motive for not producing the best and most satisfactory evidence, and is conscious that if the best were to be afforded, his object would be frustrated." *Hart v. Yunt*, 1 Watts, 253 (1832).

Facts showing that the evidence is not substitutionary but that some good excuse exists for not producing the better evidence, are admissible, with the effect of admitting the evidence otherwise excluded. *Smith v. State*, 13 Tex. App. 507 (1883); *Mark v. Hastings* (Ala.), 13 So. Rep. 297 (1893); *Crozer v. New Chester Water Co.* 148 Pa. St. 130 (1892).

What evidence is substitutionary depends upon the circumstances of each particular case. It by no means follows because more conclusive evidence is possible that a party is withholding and suppressing it because, if produced, it would injure his case. A reasonable construction of the situation is adopted.

"The rules of evidence are adopted for practical purposes in the administration of justice; and although it is laid down in the books as a general rule, that the best evidence the nature of the case will

admit of, must be given; yet it is not understood that this rule requires the strongest possible assurance of the matter in question." *Minor v. Tillotson*, 7 Peters, 99 (1833). The existence of a judgment cannot be shown by the parol statement of the creditor. It "implies that there is better evidence of its existence than mere testimony can be." *McNeill v. Donohue*, 44 Ill. App. 42 (1891).

WRITTEN INSTRUMENTS. — The rule excluding substitutionary evidence has its most rigid and invariable application where the substitution attempted is that of secondary or inferior evidence of the contents of a written instrument for the primary evidence of the instrument itself. Probably the rule (and it was a most natural beginning of the entire "best evidence" rule) concerned itself at first with sealed instruments, and was connected with the rules regulating *profert*, which required the actual production of the very instrument set up in the pleadings. The reasons requiring *profert* and the nature of the acceptable excuses are forcibly and quaintly set forth by Lord Coke. "And therefore it appears, that it is dangerous to suffer any who by the law in pleading ought to shew the deed itself to the court, upon the general issue to prove in evidence to a jury by witnesses that there was such a deed, which they have heard and read; or to prove it by a copy; for the viciousness, rasures, or interlineations, or other imperfections in these cases, will not appear to the court; or peradventure the deed may be upon condition, limitation, with power of revocation, and by this way truth and justice, and the true reason of the common law would be subverted. But yet in great and notorious extremities, as by casualty of fire, that all his evidences were burned in his house, there if that should appear to the Judges, they may, in favour of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses, that affliction be not added to affliction; and if the jury find it, although it be not shewed forth in evidence, it shall be good enough." Doctor Leyfield's Case, 10 Co. Rep. 88, 92 (1610).

The transition from the production of the document as a matter of procedure to its use as evidence and the broadening of the rule from sealed to written instruments probably proved easy.

Still, as late as 1797 the common law rule obtained in New Jersey that sealed instruments went with the jury to their consultation room as of right, while other written documents went only by consent or order of court. *State v. Raymond*, 53 N. J. 260 (1891).

MODERN "BEST EVIDENCE" RULE. — At present the rule requiring the best evidence is practically limited in scope to requiring proof of the contents of a written instrument by the primary evidence of the instrument itself until a sufficient excuse has been shown for allowing secondary evidence.

"The term 'best evidence' is confined to cases where the law has

divided testimony into primary and secondary. And there are no degrees of evidence except where some document or other instrument exists, the contents of which should be proved by an original rather than by other testimony which is open to danger of inaccuracy." *Elliott v. Van Buren*, 33 Mich. 49 (1875).

Even a certified copy of a deed is not admissible until the party offering shows that the original is not in his possession or control. *Phenix, &c. Ins. Co. v. Merchants, &c. Assoc.*, 51 Ill. App. 479 (1893).

When it appears that the party offering evidence of an inferior grade is not suppressing evidence, but is offering the best he has, such proof is received. So where the minutes of a parish meeting were never extended on the records of the parish, they may be proved by parol. *Wallace v. Townsend*, 109 Mass. 263 (1872).

The preliminary inquiry when secondary evidence is offered of the contents of a written document is whether the party offering it is suppressing the primary evidence. Has he the original document in his possession or control, and, if not, could he by reasonable care and diligence have procured it?

"Before, therefore, testimony of an inferior grade is permitted to be adduced, the court to whom the preliminary enquiry is addressed, will require satisfactory proof, that better evidence is not voluntarily withheld." *Mordecai v. Beal*, 8 Porter, 529 (1839); *Morrison v. Jackson*, 35 S. C. 311 (1891).

The rule excludes even press copies. The originals must first be accounted for. *State v. Halstead*, 73 Ia. 376 (1887); *Marsh v. Hand*, 35 Md. 123 (1871).

"A letterpress copy is not an original. It in no wise differs from any other accurate copy than in the mode in which it is made; and it can be used in the place of the original in no case where a proved copy, made in another manner, would not be equally admissible." *King v. Worthington*, 73 Ill. 161 (1874); *Foot v. Bentley*, 44 N. Y. 166 (1870); *Watkins v. Paine*, 57 Ga. 50 (1876).

The contention that such copies are always admissible is queried in *Gilbert v. Moline Plow Co.*, 119 U. S. 491 (1886). Press copies, however, are admissible upon proof that the original letters were duly sent by course of mail, and that the sendee has made diligent and fruitless search for them. *Powell v. Wallace*, 44 Kans. 656 (1890).

The onus is on the party offering secondary evidence to establish a satisfactory excuse. This he may do in one of three ways, according as the original is (a) presumably in his own possession, (b) presumably in that of the adverse party, (c) presumably in the hands of a third party.

DILIGENT SEARCH. — (a) *Own Possession.* If the document, when last seen, was in his own possession or control, a party offering

secondary evidence of the same must show diligent search in all places where the document might fairly be expected to be, and that such a search, pursued for a reasonable period, has been fruitless. *Phillips v. Trowbridge Furniture Co.*, 86 Ga. 699 (1890); *Wing v. Abbott*, 28 Me. 367 (1848); *Perrin v. State*, 81 Wis. 135 (1892); *Sebree v. Dorr*, 9 Wheat. 558 (1824); *Hart v. Yunt*, 1 Watts, 253 (1832); *Susquehanna &c. Ins. Co. v. Mardorf*, 152 Pa. St. 22 (1892); *Roberts v. Dixon*, 50 Kans. 436 (1893); *Putnam v. Goodall*, 31 N. H. 419 (1855); *Danforth v. Tennessee, &c. R. R.* 99 Ala. 331 (1892).

Where court papers were taken from the files, and traced through several successive attorneys for the plaintiff to one who said that he had never seen them, *held* that a sufficient basis had been laid for the introduction by the plaintiff of secondary evidence. *Carr v. Miner*, 42 Ill. 179 (1866).

Reasonable diligence in search is the test applied. Where an ancient deed was sought among the other similar papers of the owner of the land, without effect and no other place of search appeared, secondary evidence was admitted. "If any suspicion hangs over the instrument, or that it is designedly withheld; a more rigid inquiry should be made into the reasons for its non-production. But when there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original." *Minor v. Tillotson*, 7 Peters, 99 (1833). Where the written resolution of a board of directors was not found, on due search, in the office of the recorder of deeds, nor in that of the receiver or of the attorney for the assignee, who had received the assets prior to the receiver, but neither the secretary, president, or assignee of the company were produced or their depositions taken, *held*, that no sufficient foundation had been laid for the admission of secondary evidence. *Mullanphy Savings Bank v. Schott*, 135 Ill. 655 (1891).

"It must be proven — that a diligent, unsuccessful search has been made for it in all places where it is likely to be." *Bascom v. Toner*, 5 Ind. App. 229 (1892); *Darrow v. Pierce*, 91 Mich. 63 (1892); *Smith v. Allen*, 112 N. C. 223 (1893). "We agree that the rule of law which requires the best evidence within the power or control of the party to be produced should not be relaxed, and that the court should be satisfied that the better evidence has not been wilfully destroyed nor voluntarily withheld. But the rule on the subject does not exact that the loss or destruction of the document of evidence should be proved beyond all possibility of a mistake. It only demands that a moral certainty should exist that the court has had every opportunity for examining and deciding the cause upon the best evidence within the power or ability of the litigant." *U. S. v. Sutter*, 21 How. 170, 175 (1858); *Rullman v. Barr*, 54 Kans. 643 (1895); *Mark v. Hastings*, 13 So. (Ala.) 297 (1893); *Brooke v.*

Jordan, 14 Mont. 375 (1894). It is not sufficient that a present court stenographer could not find the notes of a former stenographer. *Susquehanna Ins. Co. v. Mardorf*, 152 Pa. St. 22 (1892).

AMOUNT OF PROOF.—“The amount of evidence required to prove the loss of a written instrument, for the purpose of admitting secondary evidence of its contents, depends, in a great measure upon the nature of the instrument and the circumstances of the case. . . . Thus, it is obvious, that the same evidence ought not to be required, to prove the loss of a promissory note, after the debt had been paid, and the note taken up by the maker, as would be requisite to establish the loss of a deed, under which a party claimed title. For, it is not usual to preserve instruments of the former character, after the debts which they represent have been paid; while title deeds are generally kept with care.” *Waller v. Eleventh School District*, 22 Conn. 326 (1853); *Wiseman v. Northern Pac. R. R.*, 20 Oreg. 425 (1891).

Slight search will be sufficient for a subscription paper which had become of no value, because the amount on which the obligation was conditional had not been raised. “It might then be treated as mere waste paper.” *Waller v. Eleventh School District*, 22 Conn. 326 (1853).

Where the record of a judgment of a deceased justice of the peace was lost, secondary evidence of its contents was not admissible in the absence of evidence of inquiry among the family of the deceased. *Wing v. Abbott*, 28 Me. 367 (1848). “To entitle a party to give parol evidence of the contents of a paper alleged to be lost, it is incumbent upon him to show that a diligent and careful search was made at the proper places and by the proper persons, and that it could not be found. It is not enough to give some evidence of its loss, but he must give such evidence as will satisfy the court that the proper foundation for the admission of secondary evidence has been laid. Where a paper which the law requires to be filed and kept by a public officer as part of the records or papers of his office, is alleged to be lost, the court has a right to require, before receiving parol evidence of its contents, that careful and diligent search was made in the office, and by one so fully acquainted with the office, records and papers as to make it probable that if the paper was in the office he would find it.” *Howe v. Fleming*, 123 Ind. 262 (1889).

A search at the Dead Letter Office will not be required in case of a missing letter, in the absence of evidence that such a search would probably be successful. *Williams v. Grey*, 23 C. P. U. C. 561 (1874).

There must be proof “that there has been diligent search and inquiry made of the proper person and in the proper place for the lost deed; that the loss must be proved, if possible, by the person in whose custody it was at the time of the loss, if such person be

living; and if dead, application should be made to his representatives and search made among the documents of deceased." *Trimble v. Edwards*, 84 Tex. 497 (1892); *Tibbals v. Ifland*, 10 Wash. 451 (1895).

If such search is not made among the effects of the deceased possessor of the document, secondary evidence is inadmissible. *Adkins v. Galbraith* (Tex. Civ. App.), 30 S. W. 291 (1895).

If such search is made, evidence of contents of a deed is admissible, "even in the absence of certificates showing the proper execution of the original." *Van Gunden v. Virginia Coal & Iron Co.*, 52 Fed. Rep. 838 (1892). "The courts have never attempted to define the precise degree of diligence essential to be shown in the effort to produce a written instrument in order to render admissible parol evidence of its contents. But it would seem to be sufficient if the party offering such proof has in good faith exhausted all the sources and means of discovery which the nature of the case would suggest, and which are accessible to him." *Baldwin v. Burt*, 43 Neb. 245 (1895).

GOOD FAITH FOR THE COURT.—The degree of proof of good faith in the search for the primary evidence is addressed to the sound discretion of the court.

"What shall constitute this satisfactory proof, to authorize the introduction of secondary evidence, cannot easily be reduced to any fixed rule; it is addressed to the discretion of the court, to be governed by the circumstances of the case." *Mordecai v. Beal*, 8 Porter, 529 (1839); *Morrison v. Jackson*, 35 S. C. 311 (1891); *Gorgas v. Hertz*, 150 Pa. St. 538 (1892); *Bain v. Walsh*, 85 Me. 108 (1892); *Williams v. Grey*, 23 C. P. U. C. 561 (1874); *Stratton v. Hawks*, 43 Kans. 538 (1890); *Elwell v. Mersick*, 50 Conn. 272 (1882); *Kleinmann v. Gieselmann*, 114 Mo. 437 (1893); *Martin v. Bowie*, 37 S. C. 102 (1892); *Brooke v. Jordan*, 14 Mont. 375 (1894). "The finding of the presiding judge upon preliminary questions of fact material to the competency of evidence at the trial are not open to revision in this court." *Stevens v. Miles*, 142 Mass. 571 (1886).

The discretion of the trial court is final, unless it has been abused. *Howe v. Fleming*, 123 Ind. 262 (1889). "His determination of the fact cannot be reviewed here, unless the proof of loss was so clear and conclusive that it was error of law to find against it." *Kearney v. Mayor &c. of New York*, 92 N. Y. 617 (1883).

There seems to be an abuse in exercising this discretion when secondary evidence is admitted of an instrument alleged to be lost where the witness, in whose custody it has been, testifies that, after an hour's search, he is unable to find it, but thinks it must be among his papers, and that, by further search, he might possibly find it. *Wilburn v. State*, 60 Ark. 141 (1895).

"Whether there was sufficient evidence of the loss of the assign-

ment of which secondary evidence was admitted, was a question of fact for the presiding judge. Unless his finding was based upon an error of law, or upon evidence which, as matter of law, was insufficient to sustain the finding, it would not here be open to revision." *Smith v. Brown*, 151 Mass. 338 (1890).

But while the preliminary inquiry necessary to the introduction of secondary evidence is addressed to the discretion of the court, yet all the evidence admitted is for the consideration of the jury. "The admissibility of the evidence was a question for the court, but its weight and effect, when taken in connection with other facts in the case, was a question for the jury, and should be left to their consideration and judgment." *Graham v. Campbell*, 56 Ga. 258 (1876).

WHAT INSTRUMENTS ARE INCLUDED. — Where the regulations of a railroad company are printed in a book, which is not produced or accounted for, parol evidence is not admissible. *Louisville, &c. R. R. v. Orr*, 94 Ala. 602 (1891); *Price v. Richmond, &c. R. R.* 38 S. C. 199 (1892).

The rule applies to books of original entry, orders, drafts, &c. *McCrary v. Jones*, 36 S. C. 136 (1891). To books of account, *Rau Mfg. Co. v. Townsend*, 50 Ill. App. 558 (1893). To time books, *Dillon v. Howe*, 98 Mich. 168 (1893). To the books of a bank, *Roden v. Brown* (Ala.), 15 So. Rep. 598 (1894). To an ordinary message, if contained in a written note. *Combs v. Com.* (Ky.), 25 So. West. 590 (1894).

The fact of a complaint to the assessors of taxes can only be shown by their record and not by the testimony of one of their number. *State v. Central, &c. R. R.* 17 Nev. 259 (1883).

Where dying declarations are reduced to writing they come under the application of the rule. *Boulden v. State*, 102 Ala. 78 (1893).

The rule under consideration applies to ancient documents equally with others. *McReynolds v. Longenberger*, 57 Pa. St. 13 (1868).

So as to documents refreshing memory. *Dillon v. Howe*, 98 Mich. 168 (1893).

So to the heading of a hotel register. *Grauley v. Jermyn*, 163 Pa. St. 501 (1894). And to proof of a foreign law. *Ennis v. Smith*, 14 How. 400, 426 (1852).

So of entries in corporation books and papers. *Mandel v. Swan Land Co.*, 154 Ill. 177 (1895).

If the authority to draw a bill of exchange is itself in writing, it must be produced. *Tensley v. Penniman*, 83 Tex. 51 (1892).

A certified copy of a registered deed is not admissible until notice has been given the grantee to produce the original. *Com. v. Emery*, 2 Gray, 80 (1854). But a plaintiff who has never had the original deeds in her possession may introduce such a copy. *Re Assignment of Rea*, 82 Ia. 231 (1891).

Whether the original is in the possession or control of the party offering a copy is a question for the court. *Bell v. Kendrick*, 25 Fla. 778 (1889).

DEGREES IN SECONDARY EVIDENCE. — The rule requiring proof of a written instrument by the production of the instrument itself, practically the solitary survival of a once sweeping "best evidence" rule, retains in many jurisdictions much of the old-time strictness of the original. It is required that even when secondary evidence is admissible an inferior degree or grade of secondary evidence shall not be received while it is in the power of the party to present a higher grade of this secondary proof.

Such is the requirement in the courts of the United States.

Where the original record of a judgment and a certified copy of the same had both been destroyed by fire, a certified copy of this first copy was held admissible. "The principle established by this court as to secondary evidence in cases like this is, that it must be the best the party has it in his power to produce. The rule is to be so applied as to promote the ends of justice and guard against fraud, surprise and imposition. . . . This court has not yet gone the length of the English adjudications, which hold, without qualification, that there are no degrees in secondary evidence." *Cornett v. Williams*, 20 Wall. 226, 246 (1873). But in *Renner v. Bank*, 9 Wheat. 581 (1824) it was held that in proving a lost note a notarial copy was not required, — "it not being necessary that a promissory note should be protested." *Ibid.*; *Stebbins v. Duncan*, 108 U. S. 32, 43 (1882). Apparently the courts of Georgia adopt a similar view. Where a blank form of a bill of sale of furniture on the instalment plan was offered with evidence that the contract between the parties was made by filling out a similar blank, the evidence was rejected. "The proper foundation was not laid for the introduction of this paper. One of the originals which had been executed should have been introduced, if obtainable. If none could be obtained from the original parties, or a certified copy of the same from the record, in case they had been recorded, then, perhaps, the paper presented might have been admissible." *Phillips v. Trowbridge Furniture Co.*, 86 Ga. 699 (1890).

So in Louisiana, where record of a copy of a marriage contract was admitted although neither the absence of the original was accounted for or any evidence offered that a copy of the original could not be procured, the judgment was reversed. "The objection embodied an elementary principle found in every work on evidence, and so completely consecrated by established jurisprudence as to dispense with any citation of authorities to support it." *Mercier v. Harnan*, 39 La. Ann. 94 (1887).

So in Arkansas, *Steward v. Scott*, 57 Ark. 153 (1893); and California, *Ford v. Cunningham*, 87 Cal. 209 (1890).

A modified insistence on degrees in secondary proof prevails in Alabama. "While the doctrine, that there are no degrees in secondary evidence has not prevailed to its fullest extent, in this State, we are not prepared to adopt a stringent extension of the rule, which excludes all secondary, until the absence of the primary evidence is accounted for, to secondary evidence. Where the secondary evidence offered, *ex natura rei*, supposes a higher degree of secondary evidence, the best should be produced. 'But, where there is no ground for legal presumption that better secondary evidence exists, any proof is received, which is not inadmissible by other rules of law, unless the objecting party can show that better evidence was previously known to the other, and might have been produced; thus subjecting him, by positive proof, to the same imputation of fraud, which the law itself presumes when primary evidence is withheld.' When a certified or examined copy of a paper required to be recorded, or a letter-press copy of a writing, is shown to be in existence, it is better evidence than the memoriter statements of a witness, and its production should be demanded." *Jaques v. Horton*, 76 Ala. 238 (1884).

"We confess that the American rule appears to us more reasonable than the English; and we see great propriety, if there was an examined copy of an instrument in the possession of a party, in refusing to allow him to prove it by the uncertain memory of witnesses. A copy of a letter, taken by a copying press would unquestionably be better evidence of the original than the recollection of its contents by a witness; and the same reasons which would require the production of the original, if in the control of the party, would operate in favor of the production of the fac-simile, or of the examined copy. But, in all these cases, the strength of the proposition consists in the fact, that there is secondary evidence, in its nature and character better than that which the party offers, and that it is in his power to produce it. He certainly must be allowed to show, that what appears to be secondary evidence of a higher degree is not so in fact. In other words, he would be allowed to show that the paper, which purported to be a copy, was not in fact and in truth one." *Harvey v. Thorp*, 28 Ala. 250 (1856).

The courts of Georgia insist upon the existence of degrees in secondary evidence. "There are degrees in secondary evidence, and the best should always be produced. . . . A sworn copy should always be received in preference to verbal testimony, to prove the contents of a written contract." *Williams v. Waters*, 36 Ga. 454 (1867).

The rule is the same in Illinois. It appearing probable that there is in existence a copy of a lost will, parol evidence of contents is not admissible until the non-production of the copy is accounted for. *Illinois, &c. Co. v. Bonner*, 75 Ill. 315 (1874).

The rule is the same in Pennsylvania. Parol evidence of the contents of a letter is not admissible while a facsimile (in a letterpress copying book) is not produced or accounted for. *Stevenson v. Hoy*, 43 Pa. St. 191 (1862).

The courts of Minnesota do not apply the rule that there are degrees in secondary evidence to cases where "the nature of the case does not of itself disclose the existence of such better evidence." *Minneapolis Times Co. v. Nimocks*, 53 Minn. 381 (1893).

On the contrary, it is held in many states that, when the sources of original evidence are exhausted, the contents of the instrument in question may be proved by any competent evidence.

Among these states is Massachusetts. "When the source of original evidence is exhausted, and resort is properly had to secondary proof, the contents of private writings may be proved like any other fact, by indirect evidence. The admissibility of evidence offered for this purpose must depend upon its legitimate tendency to prove the facts sought to be proved, and not upon the comparative weight or value of one or another form of proof." *Goodrich v. Weston*, 102 Mass. 362 (1869). "If there are several sources of information of the same fact, it is not ordinarily necessary to show that all have been exhausted before secondary evidence can be resorted to." *Smith v. Brown*, 151 Mass. 338 (1890). Maine follows the same rule. *Nason v. Jordan*, 62 Me. 480 (1873).

The rule in Indiana is the same. "There are no degrees, as a general rule, in secondary evidence." *Carpenter v. Dame*, 10 Ind. 125 (1858).

And New York. A copy of a letterpress copy is admissible after notice to the other side, in whose possession it is, to produce the original letter. *Robertson v. Lynch*, 18 Johns. 451 (1821).

In New Jersey. *Ketcham v. Brooks*, 27 N. J. Eq. 347 (1876).

In Connecticut. "The rule that a copy of a copy is not evidence, properly applies to cases where the original is still in existence and capable of being compared with it; or where it is the copy of a copy of a record, the record being still in existence, and being by law as high evidence as the original. The reason of the rule is the same in both cases, the copy offered is two removes from the original. But it is quite a different question where the original is lost, and the record is not deemed in law as high as the original." *Cameron v. Peck*, 37 Conn. 555 (1871).

TELEGRAMS. — SECONDARY EVIDENCE. — The single point of difference, so far as relates to primary and secondary proof of contents, between telegrams and other written instruments, lies in the fact that there are frequently two written instruments in each transmission of intelligence; — viz., the document delivered to the transmitting office and that delivered to the sendee by the receiving office. Which of these two instruments is the *original* document

within the meaning of the rule under consideration is, under the weight of authority, determined by the rules governing the law of agency.

"When the sender of a telegraphic message takes the initiative, the message, as delivered, may, as between him and the person to whom it is sent, be treated as the original, in the absence of evidence to show mistake in the transmission of it." *Nickerson v. Spindell*, 164 Mass. 25 (1895); *Saveland v. Green*, 40 Wis. 431 (1876); *Durkee v. Vermont Central R. R.*, 29 Vt. 127 (1856); *Morgan v. People*, 59 Ill. 58 (1871); *Anheuser-Busch Brewing Association v. Hutmacher*, 127 Ill. 652 (1889); *Western Union Telegraph Co. v. Shotter*, 71 Ga. 760 (1883); *Wilson v. Minneapolis, &c. R. R.* 31 Minn. 481 (1884); *Morgan v. People*, 59 Ill. 58 (1871); *Magie v. Herman*, 50 Minn. 424 (1892).

To the contrary effect, that the original in all cases is the message delivered at the transmitting office, see *Matteson v. Noyes*, 25 Ill. 591 (1861); *Williams v. Brickell*, 37 Miss. 682 (1859).

It is necessary in some way to show that "the alleged sender did actually send or authorize to be sent the dispatches in question." *Oregon Steamship Co. v. Otis*, 100 N. Y. 446 (1885).

This evidence may frequently be found in the telegram, signed by the party himself or his agent, *i. e.*, the copy delivered to the company. *Ibid.* *Smith v. Easton*, 54 Md. 138 (1880).

For the rule to apply at all, it is essential to show that the telegrams were in writing instead of being delivered orally, many telegrams being communicated to the transmitting office in that way. *Terre Haute, &c. R. R. v. Stockwell*, 118 Ind. 98 (1888). "In proving a contract entered into in such a manner, it would, I apprehend, be necessary to produce the original communications with the proper signatures of the parties, and the transmission over the wires might then be admitted as the means of informing them of the proposition on one side and the acceptance on the other." *Kinghorne v. Montreal Telegraph Co.*, 18 Q. B. U. C. 60, 71 (1859).

Where the person who afterwards becomes the sendee of a telegram, requests an answer by telegraph, the telegraph company becomes the agent of the sendee, and the original is the message as delivered to the telegraph company at the transmitting office. "But where the party to whom the communication is made is to take the risk of transmission, the message delivered to the operator is the original, and that is to be produced, or the nearest approach to it by way of copy or otherwise." *Durkee v. Vermont Central R. R.* 29 Vt. 127 (1856); *Smith v. Easton*, 54 Md. 138 (1880).

The rules governing the admission of secondary evidence in the case of telegrams are the same as obtain in connection with other written instruments. *Saveland v. Green*, 40 Wis. 431 (1876); *Western Union Telegraph Co. v. Collins*, 45 Kan. 88 (1890);

Prather v. Wilkens, 68 Tex. 187 (1887); Howley v. Whipple, 48 N. H. 487 (1869); State v. Hopkins, 50 Vt. 316 (1877); Lindauer v. Meyberg, 27 Mo. App. 181 (1887); Western Union Telegraph Co. v. Cline, 8 Ind. App. 364 (1893).

There is no question that a *telephone* message may be proved by the oral evidence of the sendee. Wilson v. Minneapolis, &c. R. R. 31 Minn. 481 (1884).

When parol evidence is admissible as to the contents of a written instrument it is naturally confined to such portions of the instrument as would be relevant if the instrument itself were produced. It is no objection to the competency of a witness that he cannot state the immaterial portion of a letter. McGibbon v. Burpee, 25 New Bruns. 81 (1885).

ADMISSIONS AS PROOF OF CONTENTS. — Whether an admission by a party otherwise entitled to insist upon primary proof of contents by production of the original, regarding the contents of a written instrument is such a *levamen probationis* as to dispense with the proof of such contents is in dispute.

That an admission does have that effect, see Wolf v. Lachman (Tex. Civ. App.), 20 S. West. 867 (1892); Loomis v. Wadhams, 8 Gray, 557 (1857); Hoefling v. Hambleton, 84 Tex. 517 (1892); Morey v. Hoyt, 62 Conn. 542 (1893).

So of the contents of a telegram, as admitted by the sender. Williams v. Brickell, 37 Miss. 682 (1859).

To the contrary, see Welland Canal Co. v. Hathaway, 8 Wend. 480 (1832). "The admissions of a party are competent evidence against himself only in cases where parol evidence would be admissible to establish the same facts, or in other words, where there is not, in the judgment of the law, higher and better evidence in existence to be produced." *Ibid.*

Production of written receipts is not excused by the fact that a third party has made a memorandum of them to the accuracy of which the party demanding primary proof has assented. Hart v. Yunt, 1 Watts, 253 (1832).

In New Jersey the rule prevails that while an ordinary admission does not have the effect of relieving the adverse party from the necessity of proving the contents of a written instrument, a "formal and solemn" admission has been "ever regarded as intrinsically possessing all the force of primary evidence." Cumberland, &c. Ins. Co. v. Giltinan, 48 N. J. Law, 495 (1886).

The rule requiring primary evidence of contents is not dispensed with in favor of a holder in a suit against the maker on a promissory note by the fact that under a statute the defendant is not entitled to dispute his signature, having filed no affidavit to that effect. Seebree v. Dorr, 9 Wheat. 558 (1824).

(b) PAPERS IN ADVERSE POSSESSION. — If the original document

is in the possession of the adverse party, his failure to produce it, upon being seasonably requested so to do, will be regarded as sufficient proof that the party is not suppressing evidence to let in secondary evidence of contents. *Steed v. Knowles*, 97 Ala. 573 (1892); *Roberts v. Dixon*, 50 Kans. 436 (1893); *Coffman v. Niagara &c. Ins. Co.*, 57 Mo. Ap. 647 (1894); *Morse v. Woodworth*, 155 Mass. 233, 248 (1892). Or to his attorney. *Den v. M'Allister*, 7 N. J. Law, 46, 53 (1823). This is sufficient even where there was no evidence that the original had never been in the hands of the defendant, but was traced into the hands of his attorney through his connection with another case. *Ibid.* "But such notice may be dispensed with upon proof that such party has said that such writing has been lost or destroyed. . . . The law nowhere requires the doing of an obviously nugatory and unavailing act." *Barmby v. Plummer*, 29 Neb. 64 (1890); *U. S. v. Britton*, 2 Mason, 464 (1822).

So where from the nature of the action the defendant has notice that the plaintiff intends to charge him with the possession of a written instrument, *e. g.*, a notice in writing, formal notice to produce is not required. *Railway Co. v. Cronin*, 38 Oh. St. 122 (1882); *Howell v. Huyck*, 2 Abb. App. Cases, 423 (1867).

In a criminal case, where an original instrument is in the possession of the accused, apparently notice to produce is excused. The court will not compel him to furnish evidence against himself. *State v. Gurnee*, 14 Kans. 111 (1874). See also *Dunbar v. U. S.*, 156 U. S. 185 (1894).

An admission by the defendant that he wrote a letter which he refuses to produce on notice is sufficient to admit secondary evidence of its contents. *Dunbar v. U. S.*, 156 U. S. 185 (1894).

Where the defendant puts in part of a letter which he has received from the plaintiff, but which the plaintiff claims is mutilated, the plaintiff can give parol evidence of the mutilated portion without a notice to produce given to the defendant. *Robinson v. Cutter*, 163 Mass. 377 (1895).

A seasonable notice must be given. A notice given on the same day as the copy was received in evidence, the opposite attorneys disclaiming any knowledge of the original, has been held insufficient. *Pitt v. Emmons*, 92 Mich. 542 (1892).

So a notice to attorneys to produce papers which are in a distant state must be sufficiently extended to permit the originals to be found and produced if secondary evidence is to be received. *Dade v. Aetna Ins. Co.*, 54 Minn. 336 (1893).

Less extended notice may be sufficient where the party in whose possession they are, in view of their relation to the case or their use in former hearings, has reason to expect that the originals will be called for. *Battaglia v. Thomas*, 5 Tex. Civ. App. 563 (1893).

If the instrument is within the control of a party it is the same

thing as if in his possession. "If a party has the legal right to the possession of a document, in a legal sense it is within his control, though he may have left it with an agent or other person, from whom he has a right to receive it by demanding its possession." *Wilson v. Wright*, 8 Utah, 215 (1892).

Where the defendant, on being requested to produce certain written receipts, excuses their non-production by claiming that a third party refuses to surrender them, he cannot afterwards introduce parol evidence of their contents if the judge finds that, in point of fact, the defendant has attempted to suppress the written receipts. "A party who has suppressed a written document, and refused to produce it upon notice, and so compelled the adverse party to resort to secondary evidence thereof, is not afterwards entitled to offer proof of its contents." *Gage v. Campbell*, 131 Mass. 566 (1881).

Mere failure to produce a written document on notice, where a reasonable excuse exists, will not prevent the party on whom the demand was made from proving its contents by secondary evidence. *Spears v. Lawrence*, 10 Wash. 368 (1894).

(c) POSSESSION IN A STRANGER. — I: the document itself is presumably in the possession of a third party, reasonable efforts to procure his attendance as a witness, with the document, will be required in order to admit secondary evidence of contents. *Greer v. Richardson Drug Co.*, 1 Tex. Civ. App. 634 (1892).

Where the document is in the hands of a third person outside the reach of the process of the court, production is excused. *Cabot v. Given*, 45 Me. 144 (1858); *Mordecai v. Beal*, 8 Porter, 529, 536 (1839); *Pensecola R. R. v. Schaffer*, 76 Ala. 233 (1884); *Beattie v. Hilliard*, 55 N. H. 428 (1875); *Missouri, &c. R. R. v. Gernan*, 84 Tex. 141 (1892); *Burton v. Driggs*, 20 Wall. 125 (1873); *Gordon v. Searing*, 8 Cal. 49 (1857); *Zellerbach v. Allenberg*, 99 Cal. 57 (1893); *Brown v. Wood*, 19 Mo. 475 (1854); *Shepard v. Giddings*, 22 Conn. 282 (1853); *Ralph v. Brown*, 3 W. & S. 395 (1842). When the residence of the holders of an instrument is beyond the jurisdiction of the court, the instrument is presumably out of the jurisdiction. *Manning v. Maroney*, 87 Ala. 563 (1888).

But see *Mullanphy Savings Bank v. Schott*, 135 Ill. 655 (1891). where, upon the original paper being traced into the probable possession of persons outside the jurisdiction, the court suggest that "Although all three were either non-residents or out of the state at the time of the hearing, yet no reason is perceived why their testimony could not have been taken." "It has repeatedly been held that the person last known to have been in possession of the paper must be examined as a witness, to prove its loss, and that even if he is out of the State, his deposition must be procured if practicable, or some good excuse given for not doing so." *Kearney v. Mayor, &c.*,

92 N. Y. 617 (1883). "The law provides an easy and simple method of taking the deposition of a witness residing out of the state, and his deposition should have been taken, or some proper effort made to obtain it. The fact that the person to whose possession the paper was traced resided out of the state, did not excuse defendant from a diligent effort to procure it." *Wiseman v. Northern Pacific R. Co.*, 20 Oreg. 425 (1891); *Wood v. Cullen*, 13 Minn. 394 (1868); *McGregor v. Montgomery*, 4 Pa. St. 237 (1846); *Porter v. Hale*, 23 Can. Sup. 265 (1894).

But if the party having the custody of the original is out of the state, and on being asked to give a deposition refuses in the interest of the opposite party to surrender the original, secondary evidence is competent. *Thomson-Houston Electric Co. v. Palmer*, 52 Minn. 174 (1893).

If an original deed is in a foreign court, which declines to permit its removal, a copy is admissible. *Owers v. Olathe Co. (Colo.)*, 39 Pac. Rep. 980 (1895).

The suggestion that parol evidence is substitutionary and offered in bad faith instead of written evidence, and to avoid its effect, presents itself in a most incisive form when it appears that the original has been voluntarily and intentionally destroyed by the party offering the parol evidence. Under such circumstances the party is not allowed to offer secondary evidence. *Bagley v. McMickle*, 9 Cal. 430 (1858); *Count Joannes v. Bennett*, 5 All. 169 (1862); *Rudolph v. Lane*, 57 Ind. 115 (1877).

So where original documents are destroyed by the plaintiff after the commencement of the suit. *Baldwin v. Threlkeld*, 8 Ind. App. 312 (1893).

Where the destruction is by accident or in good faith, parol evidence of contents is competent. *Pollock v. Willcox*, 68 N. C. 46 (1873); *Steele v. Lord*, 70 N. Y. 280 (1877). But the party destroying must repel every inference of a fraudulent design in its destruction. *Blake v. Fash*, 44 Ill. 302 (1867).

Mere negligence is not fatal to the right to introduce secondary evidence. *Rodgers v. Crook*, 97 Ala. 722 (1892).

The rule requiring the contents of a written instrument to be proved by the production of the instrument itself, does not apply when the only fact to be proved is that of the execution of the instrument. "Here the suit was not on the paper: its contents had nothing to do with the case." *Shoenberger v. Hackman*, 37 Pa. St. 87 (1860). "The rule that excludes secondary evidence in a contest with primary, does not mean that everything is secondary which is not of the highest grade of proof, but only that which discloses the existence of other evidence, the non-production of which may be supposed to be on the ground that if produced would work against the party offering it." *Ibid.* So wherever the effort is to

prove the existence of a fact which may be shown by a writing, parol evidence of the same fact is not rejected. For example, "If a person acts notoriously as cashier of a bank, and is recognised by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts, as cashier, will bind the corporation, although no written proof is or can be adduced of his appointment." *Bank of United States v. Dandridge*, 12 Wheat. 64, 70 (1827). So where it is sought to prove, not the contents of certain depositions, but simply the fact that they were properly taken and used in a previous suit between the same parties touching the same subject-matter, this may be done by parol. *Ayers v. Chisum*, 3 New Mex. 52 (1884). In a case involving the foreclosure of a mortgage by notices posted, objection was made to evidence of the posting of these notices on the ground that they were in writing and should have been produced. Held otherwise. "The rule requiring the production of the writing itself as the best evidence does not extend to mere notices or to matters collateral." *McMillan v. Baxley*, 112 N. C. 578 (1893). So the substantive fact that proofs of loss had been made and delivered under an insurance policy may be proved by parol. "The thing to be proved, therefore, was not what was contained in the written proofs of loss but the fact that such written proofs of loss had been furnished to the company within the prescribed time." *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213 (1891). A witness may state that he had a mortgage, began a suit to foreclose it, and took a deed of the same property, although the record could also be used to prove them. *File v. Springel*, 132 Ind. 312 (1892). A witness may testify that he received orders from the Post Office Department to demand certain things of a defaulter, though these orders were in writing. "The question did not call for the contents of the orders." *Alexander v. U. S.*, 57 Fed. Rep. 828 (1893). So evidence is admissible that a defendant applied in writing for a government liquor license, though the application is not produced. *State v. McGill*, 65 Vt. 604 (1893). In an action against a railroad company for failure to carry a theatrical company to their destination on time, the plaintiff may testify that he was to receive 75 per cent. of the box receipts, though the agreement establishing this share was in writing. *Foster v. Cleveland, &c. R. R.*, 56 Fed. Rep. 434 (1893).

On an action for failure to deliver a telegraph message, parol evidence of the contents of the message as delivered and received is admissible. "That a certain message was delivered for transmission was a substantive fact necessary to be proved, and the rule is, that when parol evidence is as near the fact testified to as the written, then each is primary." *Western Union Telegraph Co. v. Cline*, 8 Ind. App. 364 (1893).

In refusing to apply the best evidence rule so as to exclude parol

evidence that A was not mentioned in a certain will not directly involved in the case itself, the Supreme Court of Alabama say: "The question was not one directly raised by the issue in the cause, but came up incidentally. In such case, the rule requiring the highest and best evidence the nature of the question admits of does not apply." *Bulger v. Ross*, 98 Ala. 267 (1892).

A party may testify to the payment of money though a receipt was taken at the same time. *Davis v. State*, 92 Tenn. 634 (1893).

In an action on an account for rent or use and occupation, the plaintiff can recover on proof of an admission that the account is correct and due notwithstanding the defendant has taken a written lease of the premises from the plaintiff, and this lease is neither produced nor any attempt made to account for it. *Burch v. Harrell*, 93 Ga. 719 (1894).

Parol proof of the identity and character of an instrument not produced will be admitted. The "best evidence" rule applies only to proof of contents. *Morrison v. Jackson*, 35 S. C. 311 (1891). On a complaint brought under the laws regulating the sale of intoxicating liquor, evidence is competent as to what was written on labels attached to jugs and decanters in the defendant's shop, without producing them, or accounting for their not being produced. "The labels on the jugs do not come within any class of written instruments, the contents of which cannot be proved without producing the original paper or document, or accounting for its loss or unavoidable absence." *Com. v. Blood*, 11 Gray, 74 (1858).

SCOPE OF RULE. — The rule requiring production of the primary evidence of the contents of a written instrument applies only when the instrument in question is admissible itself because relevant to the issue. It does not extend to the use of written instruments in incidental or collateral matters. "This rule has never been understood to extend to matters aside from the issue and merely incidental to the trial. Thus, the interest of a witness, and similar concerns, could always be shown without the production of the document by force of which such interest had been acquired." *Cumberland, &c. Ins. Co. v. Giltinan*, 48 N. J. Law, 495 (1886). "The general rule has no application where the written instrument is merely collateral to the issue; as where the parol evidence relates to matters distinct from the instrument of writing, although the same fact could be proved or disproved by the writing." *Coonrod v. Madden*, 126 Ind. 197 (1890); *Schoenberger v. Hackman*, 37 Pa. St. 87 (1860).

But it has been held that a witness cannot be questioned about a copy of a statement until the non-production of the original is accounted for. *Glen Brick Co. v. Shackell*, 14 Low. Can. Jur. 238 (1870). Or allowed to refresh his memory by a copy of a deed until the original has been accounted for. *Jones v. Jones*, 94 N. C. 111 (1886).

Parol evidence of contents cannot be given until proof is offered that the original, if itself produced, would be competent. The contents of a letter supposed to have been written by the prosecuting witness in a bastardy complaint cannot be proved until some evidence is adduced that she wrote the letter itself. *Stevens v. State*, 50 Kans. 712 (1893). A lease cannot be proved by parol until the subscribing witness is produced. *Hughes v. Southern Warehouse Co.*, 94 Ala. 613 (1891).

In case of parol proof of the contents of a lost will; "Unless the whole can be proved, his intention will not be effectuated, and therefore no part of the will can be established." *Davis v. Sigourney*, 8 Metc. 487 (1844). But that a certain instrument is a copy of a will and that the will was properly executed may be proved by parol. *Keagle v. Pessell*, 91 Mich. 618 (1892).

The rule above stated does not extend so far as to forbid other evidence of the fact which the written instrument would establish. *Consaul v. Sheldon*, 35 Neb. 247 (1892). So where a certain sum of money was paid and a receipt taken therefor, the evidence of a witness who saw the sum of money paid is competent, even if the same witness would not be allowed, until a suitable foundation was laid, to state the contents of the receipt. "The difference between the two principles consists in this: The payment of the money was a fact testified to independent of the receipt, and was capable of parol proof. But when the witness went further and stated that he saw a receipt for the money signed, he undertook to give the contents of the receipt, and the receipt itself was the better evidence." *Steed v. Knowles*, 97 Ala. 573 (1892); *Hyde v. Shank*, 93 Mich. 535 (1892). Ownership in a vessel may be shown by acts of ownership equally well as by the ship's register. *Stearns v. Doe*, 12 Gray, 482 (1859). A horse-car conductor may testify to the number of his passengers on a particular trip though his slip is not produced. *Wynn v. City, &c. R. R.* 91 Ga. 344 (1893).

But see also *Coder v. Stotts*, 51 Kans. 382 (1893).

The rule does not apply where a written document is used to "test the temper and credibility of the witness." *Klein v. Russell*, 19 Wall. 433, 439, 464 (1873).

A photographic copy will not excuse failure to produce the original. *Maclean v. Scripps*, 52 Mich. 214 (1853).

DUPLICATES. — The rule also does not apply to the case of duplicate originals. In such case, each of the duplicates is admissible, not as a copy but as an original. *Gardner v. Eberhart*, 82 Ill. 316 (1876).

There is no obligation to account for the absence of the other duplicates or any of them. *Cleveland, &c. R. R. v. Perkins*, 17 Mich. 296 (1868).

Where two letters are written at the same time, one being retained

and the other sent, the one retained is not a copy but a duplicate original, and is admissible without notice to produce the other original. *Hubbard v. Russell*, 24 Barb. 404 (1857).

When a paper is made out in duplicate and one of the originals is lost and the other in the hands of the person accused of a criminal offence, a copy is admissible, as the court cannot compel the prisoner to put in the other original against himself. *State v. Gurnee*, 14 Kans. 111 (1874).

So where a bill of lading was executed in duplicate, the plaintiff, to prove the contents by secondary evidence, must satisfactorily account for the non-production of both originals. When the plaintiff introduces parol proof of contents, the defendant may rebut the proof by evidence of a similar nature. *Dyer v. Fredericks*, 63 Me. 173, 592 (1874).

PROOF OF CONTENTS. — The parol evidence of contents must be confined to an attempt to state the language contained in the written instrument. Evidence is not competent of the previous conversation of the parties in relation to what they proposed to agree in the writing to be drawn up. *Richardson v. Robbins*, 124 Mass. 105 (1878).

The language itself is to be given and not evidence as to what the witnesses understood were the propositions made and accepted in the written instrument. *Elwell v. Walker*, 52 Ia. 256 (1879); *Burr v. Kase*, 168 Pa. St. 81 (1895).

A photographic reproduction of the original is admissible as secondary evidence. It is merely a copy and whether a facsimile or not is a question of fact for the jury. *Eborn v. Zimpelman*, 47 Tex. 503 (1877).

DEPOSITIONS. — The law relating to depositions is so largely statutory and so varying in the different states that it appears hardly to admit of profitable attempts at classification.

